



# Chevron Ruling Impact on EHS

Panelists: *Adele L. Abrams, Esq., ASP, CMSP* and *Richard Fairfax*  
 Moderator: *Bruce Donato*

SEPTEMBER 2024

## Agenda

- |                     |                                   |
|---------------------|-----------------------------------|
| <b>8:00 – 8:15</b>  | Arrival and Food                  |
| <b>8:15 – 8:25</b>  | Attendee Introductions            |
| <b>8:25 – 8:30</b>  | Treasurer's Report                |
| <b>8:30 – 8:40</b>  | Board Member Update & By-Law Vote |
| <b>8:40 – 8:45</b>  | Host Time                         |
| <b>8:45 – 8:50</b>  | Sponsor Time                      |
| <b>8:50 – 9:55</b>  | Panel Introduction and Discussion |
| <b>9:55 – 10:00</b> | Member Raffle                     |
| <b>10:00</b>        | Adjourn                           |





# Attendee Introductions

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# Treasurer's Report

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# Board Member Update

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## 2024-2025 Board of Directors



- |                       |  |
|-----------------------|--|
| <b>Ryan Radomski</b>  | President  |
| <b>Alex Rodas</b>     | Vice President                                       |
| <b>Jose Valdizan</b>  | <b>Secretary</b>                                     |
| <b>Eddie Arthur</b>   | Treasurer  |
| <b>John Pilkinton</b> | Chief Technology Officer                             |
| <b>Brendan Esch</b>   | Chief Technology Officer ( <i>effective Oct. 1</i> ) |



## Updated By-Laws Member Vote

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TO REGISTER OR SPONSOR

## ASSP NOVA & WMACSA Charity Golf Tournament

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SEPTEMBER 26

**WE STILL HAVE ROOM FOR SPONSORS OF BEVERAGE CARTS, HOLES, AND LUNCH!**

Host



—| CBG

Sponsor



STEP + BY C2MS



# SMARTSHEET

## By the numbers As of Q3 FY23

### CUSTOMERS

**100k+**

Customers

**11M+**

Connected users

**80%+**

Fortune 500 customers

### ENTERPRISE

**1,300+**

Customers with >\$100,000 ARR

**90%+**

Fortune 100 customers

**152%**

DBNR within the Fortune 100

### ECOSYSTEM

**350+**

Global partners

**80+**

Integrations & connectors

**Billions**

of records each month processed that connect with other systems

### ESTABLISHED

**\$776M**

Q3 FY23 TTM license revenue

**129%**

Dollar-based net retention rate

**3,000+**

Employees

**17**

Years in business



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## "Global Top 10 Retailer" Use Cases with Smartsheet



**Construction Management**

### Store Remodel Program

This team is running end to end management for the remodel of all retail storefronts



**ISM Operations**

### In-Store Merchandising Management

This team plans, manages, and executes all in-store signage across all of the retailers locations. All of that proactive planning and reactive change request management is conducted in Smartsheet.



**Tech Services**

### IT Rollout

TTS is chartered with delivering technology for guests and teams with minimal disruption. There are a number of moving parts with 6 deployment teams, 1800 locations, 5 installation vendors and dozens of projects in play at any given time.



**Corporate Comms**

### Communication Roadmap

This team employs a robust editorial calendar powering 12 internal and external communications channels. This roadmap has become an integral part of managing both content and timing of communications.



**Supply Chain Operations**


### Performance Acceleration

The process of transitioning a store from season to season is complex, multi-million dollar process that requires excellent collaboration, and program management.

Smartsheet empowers 11k employees and 3k business partners to work better in 52 countries across 6 continents.



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## Testimonial



**Charles E. Davis, III**  
**Co-Owner and Vice President-  
 Operations-Risk Management**  
 Fly & Form Concrete Structures, Atlanta, Georgia  
 ABC National HSE Committee  
[cdavis@flyandform.com](mailto:cdavis@flyandform.com)





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MANAGE EXCELLENCE

Contact Us for a DEMO

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7



# Panelist Introductions

**MODERATOR:** BRUCE DONATO | K&A FIRST AID & SAFETY

# Panelists



**Adele L. Abrams | Law Offices of Adele Abrams, P.C.**

**Richard Fairfax | OSHA (Retired) / National Safety Council**  
*Former Deputy Assistant Secretary*

## The Role of Executive Agencies

### Three Branches of Government:

- Legislative: Makes laws.
- Executive: Enforces laws.
- Judicial: Interprets laws.

### • Role of Executive Agencies:

- Part of the executive branch.
- Implement and enforce laws passed by Congress.

## What is (was) Chevron Deference?

- Congress and Executive Agencies were configured so that Congress could draft statutes that were ambiguous, and agencies relied on Chevron deference because it granted them a degree of autonomy and authority in interpreting the laws they administer.
  - Part of the executive branch.
  - Implement and enforce laws passed by Congress.
  - Agency Expertise - Agencies have specialized knowledge and expertise
  - Agencies could adapt regulations to changing circumstances.
  - Legislative processes may be too slow to keep pace with new developments.

## Implications for Executive Agencies

- Increased Judicial Scrutiny:
  - Courts to play a more active role in interpreting statutes.
- Reduced Agency Flexibility:
  - Agencies may face challenges adapting regulations quickly.
- Potential Shift in Power Dynamics:
  - More legislative clarity required.
  - Possible increase in litigation over agency decisions.
  - Slower response to complex issues.
  - Greater involvement of Congress in detailed policymaking.

## OSH Act Implications: Rulemaking

- Could lead to delays in future rulemaking as regulators determine how to best support intended actions, as Agencies like OSHA may face greater challenges to future regulatory action.
- Could also lead to better long-term stability and cohesiveness with other regulations, as Court may be willing to consider whether Congress intended the OSH Act to exist cohesively with other laws.

## OSH Act Implications: Citation Characterization

- Willful citations
  - Intentional disregard
  - Plain indifference
- Repeat citations
  - 5 year look back period instead of 3 years?
  - Corporate-wide and nationwide reach?
  - What is a substantially similar violation?

## OSH Act Implications: Enforcement Policies

- **Instance-By-Instance (IBI) Citations**

- Egregious (willful) cases
- 2023 policy change allowing IBI citations for serious violations



- **Severe Violator Enforcement Program**

- Sister facility inspections
- SVEP log publication
- Press releases

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## OSH Act

**NOTE: OSH Act does not define unit of prosecution, except Failure to Abate which allows penalties on a per-day basis**



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## OSH Act Implications: The General Duty Clause

- Section 5(a)(2) requires employers to comply with safety and health standards.
  - Does OSHA have power to draft standards?
  - Standards subject to challenge without *Chevron* deference.
- Section 5(a)(1) requires employers to furnish place of employment free from recognized hazards likely to cause death or serious injury.
  - This duty is clearly set forth in the OSH Act.
  - Will OSHA use GDC to replace challenged standards?

## OSH Act Implications: Enforcement Programs and Guidance

- Inspection types
  - Complaint
  - Serious Incident
  - National, Regional, and Local Emphasis Programs
  - Follow-up
- LOTO and other Directives interpreting standards
- Letters of Interpretation

# SIGNIFICANCE OF CHEVRON

- *Chevron v. Natural Resources Defense Council* (SCOTUS 1984) looked at agency authority limits and the role that Congress and courts played in determining the constitutionality of standards
- *Chevron* held: where specific language in the original legislation (e.g., OSH Act) is ambiguous or silent, a court reviewing agency action should defer to the agency if its action is “reasonable” based on the organic statute
- Idea was that agencies had subject matter experts on the areas they regulate – workplace safety, food, aviation, rail, product safety – and are best positioned to determine everything from restrictions on child labor to agricultural and environmental practices
- Absent such deference, courts will now have to decide whether a rule is legal based on their own expertise, their analysis of decades-old statutes, or else Congress will have to specifically authorize a specific regulation if it was not mentioned in the original legislation
- In reversing *Chevron*, Justice Roberts wrote: “[A]gencies have no special competence in resolving statutory ambiguities ... courts do. It remains the responsibility of the court to decide whether the law means what the agency says. Congress expects courts to handle technical statutory questions and courts also have the benefit of briefing from the parties and ‘friends of the court’.”

# DEMISE OF CHEVRON DEFERENCE

- SCOTUS 6/28/24 decision in *Loper Bright Enterprises v. Raimondo* overturned its 40-year precedential test – “*Chevron* deference” when evaluating whether courts should defer to an agency’s “reasonable” interpretation of “ambiguous” statutory language
- *Chevron* is a foundational test in administrative law, and was long used in OSHA/MSHA/EPA cases to help agencies preserve new rules or enforcement actions against claims that the agency went beyond its authorizing statute
- Concerns arising that judges can now substitute their views on a topic for those of the agency SME who drafted it, including disregard of comments and hearings in the development of the rule
- This is major incentive for “forum shopping” to find federal courts in districts/circuits most likely to kill federal rules as they will no longer have to “defer” to the agency’s expertise, experience & judgment

## PRACTICAL IMPACT: *LOPER BRIGHT*

Using the pending OSHA heat standard as an example, based on *Loper Bright*, courts can now:

1. Accept OSHA's reasoning as acceptable under the law
2. Reject the standard outright because the statutory source (OSH Act) is silent on the subject of heat and OSHA would need specific congressional authorization to promulgate a heat rule
3. Individual judges could decide "based on their personal knowledge" that the rule is not acceptable, or that different choices should have been made

**Real Question:** what expertise do judges have in the OHS area? Can they pick an OEL for a chemical, a heat level for safety, underground mine roof bolting and ventilation plan design, or guarding specifications for machinery?

**Real World Impact:** Decision is likely to support challenges to OSHA walkaround rule, HazCom revisions, heat standard in development, MSHA respirable crystalline silica standard (under contest) and surface haulage rule

## OSHA IN THE CROSSHAIRS

- *Allstates Refractory Contractors LLC v. Su* (6<sup>th</sup> Cir. 2023) – Challenged constitutionality of Occupational Safety & Health Act of 1970 (OSH Act) – Former Trump White House counsel Don McGahn represents Allstates in this case!
- Coalition of industry and conservative groups sued to determine whether the congressional delegation to OSHA to set workplace safety standards violated the "Nondelegation Doctrine"
- The Petitioners want Congress, not OSHA, to "set whatever specific safety standards lawmakers think are necessary"
- Challenges to the OSH Act in the past were struck down (in 1978 and 2011) by 7<sup>th</sup> Cir. and DC Cir.
- 6<sup>th</sup> Cir "joined their sister circuits" in holding OSHA's delegation to be constitutional (by a 2-1 vote)
- Appeal to SCOTUS failed to obtain certiorari ... but Justices Thomas and Gorsuch voted to grant review (4 votes are needed) and this is poised for another attempt

## CORNER POST – REOPENING RULES

- SCOTUS Administrative Law decision, *Corner Post v. Board of Gov of Federal Reserve System* (6-3 decision) held that lawsuits over OSHA rules and other agencies “final agency action” do not have to begin within 6 years of the promulgation of the rule, but instead must be brought within 6 years of when the party was first injured by a particular policy (overturns 75 years of precedent)
- This opens floodgates for lawsuits against long-standing OSHA/MSHA/EPA agency rules and policies
- Decision (Justice Barrett) was under Administrative Procedure Act (APA) and held that the claim accrues “when plaintiff is injured by final agency action”
- Dissent (Justice Brown Jackson) warned that “The tsunami of lawsuits against agencies ... has the potential to devastate the functioning of the Federal Government” ... there are “no longer any limitations period for lawsuits that challenge agency regulations on their face” which is “destabilizing for both government and businesses”
- WV AG commented “Federal agencies should be held to account for their actions, even when years have passed from the time the rule was first issued”

## How do you see *Loper Bright* changing citations?



Compliance Reports  
 Challenging of Citations  
 Resources of the Courts  
 Resolving of Cases  
 Interpretation of Standards

## What do you think the affect on the following will be?



Injury Rates  
Fatalities  
OSHA Recordables  
Worker's Compensation

## How do you see *Loper Bright* affecting worker injuries from the following perspectives?



Bottom Line and Business is Top Priority  
Safety Conscious Company



How do you see *Loper Bright* affecting the effectiveness of EHS professionals?



What should EHS professionals be doing in response to *Loper Bright*?



# OPEN QUESTION SESSION



## Member Raffle

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# October Meeting Preview

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DRUGS IN CONSTRUCTION AND OPTIONAL NARCAN TRAINING



# THANK YOU FOR SUPPORTING WMACSA!

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DRIVE SAFE