

Why The Supreme Court Ruling To Limit Federal Agency Power Is A Big Deal For Real Estate

By Taylor Driscoll

When the Supreme Court ruled Friday to scrap a decades-old precedent that gave federal agencies the power to interpret vague laws as they regulate businesses, it created an easier pathway for companies to challenge rules they don't like.

The 6-3 decision overturning 1984's *Chevron v. Natural Resources Defense Council* limits the powers of dozens of federal agencies to regulate the environment, public health, employment and other sectors.

With the decision overturned, legal experts who spoke to Bisnow said they believe it will have tremendous impacts on commercial real estate because of how deeply embedded it is in the American economy.

"Real estate is touched by so many different laws and regulations," said Holland & Knight partner Lynn Calkins, who leads the law firm's new *Chevron* deference working group. "It's almost important for [owners] to look holistically at their business to see, 'What do we have in place that we're operating under that's regulated by federal agencies as a whole?'"

The precedent stipulated that courts defer specific rulings to federal agencies to determine how to implement certain legislation passed by Congress. This deference has been used in tens of thousands of cases in the last four decades.

The precedent was challenged in two separate cases, *Relentless v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo*, that revolved around National Marine Fisheries Service regulations about overfishing on commercial ships.

Calkins, who has litigated a number of *Chevron* deference cases, said for those in the real estate industry, the largest example of possible impact is the way the Department of Housing and Urban Development has implemented the 1968 Fair Housing Act.

"It is a statute that is incredibly vague and broad, and HUD in particular, has taken a lot of liberty to establish what it views the law to be through guidance and different regulations," Calkins said. "There's likely to be a fair amount of question if those policies continue to be viewed as the law."

In recent years, the *Chevron* ruling has been the subject of focus by conservatives, who argue these federal agencies impose different rules and regulations as a new administration takes office, *The Washington Post* reported.

"This decision will promote stability in the law, granting both industry and the general public much

greater certainty in the meaning of statutes," Geoffrey Manne, the president of the International Center for Law & Economics, said in a statement. "It will also put the onus on the people's representatives in Congress, rather than unelected bureaucrats, to fix statutes in light of new social problems. This is a win for the rule of law over executive prerogative."

In January, the court decided to revisit the ruling in a pair of cases regarding a fee charged by federal observers monitoring herring boats to prevent overfishing.

In an opinion penned by Chief Justice John Roberts, the supermajority conservative court ruled that agencies overstepped, striking down the Chevron doctrine and handing the power to rule on legal interpretations to the courts.

"Chevron was thus a fundamental disruption of our separation of powers. It improperly strips courts of judicial power by simultaneously increasing the power of executive agencies," Roberts wrote for the majority. "Although the Court finally ends our 40-year misadventure with Chevron deference, its more profound problems should not be overlooked."

The three liberal justices — Elena Kagan, Sonia Sotomayor and Ketanji Brown Jackson — were the three dissenting voices, arguing that the majority overstepped in determining that specialized experts staffing the federal agencies are less equipped than judges to determine nuanced regulatory measures.

"In one fell swoop, the majority today gives itself exclusive power over every open issue — no matter how expertise-driven or policy-laden — involving the meaning of regulatory law," Kagan wrote in her dissent. "As if it did not have enough on its plate, the majority turns itself into the country's administrative czar."

Rafe Petersen, a partner at Holland & Knight who specializes in environmental policy, said there are several laws surrounding resiliency, climate change and environmental justice that could be challenged as well.

"All of these, arguably, are extensions of regulations," Petersen said. "It's sort of like the regulations then extended further, and they're not clearly provided in the law. I think those are likely going to be challenged."

Calkins said zoning rules, while not federal laws, could be challenged on the same grounds, depending on how local officials interpret their jurisdictions' statutes.

"Buildings are built, they have issues related to their tenants in terms of privacy on the management side," Calkins said. "Privacy laws, telecommunication issues, there's financing issues, and all of those are overseen by federal agencies."

Calkins and Petersen said the biggest short-term impact of this ruling will be the influx in client

demand and the challenges that will come to these rulings.

Petersen said that with the precedent being overruled, it will give businesses a leg up against regulators that they have never had before and make it easier for them to challenge agency oversight that isn't definitive law.

"It levels the playing field. [Agencies] start on second base because they're entitled to deference on their opinions," Petersen said. "It's really important for private parties. It gives them a chance to present objective arguments."