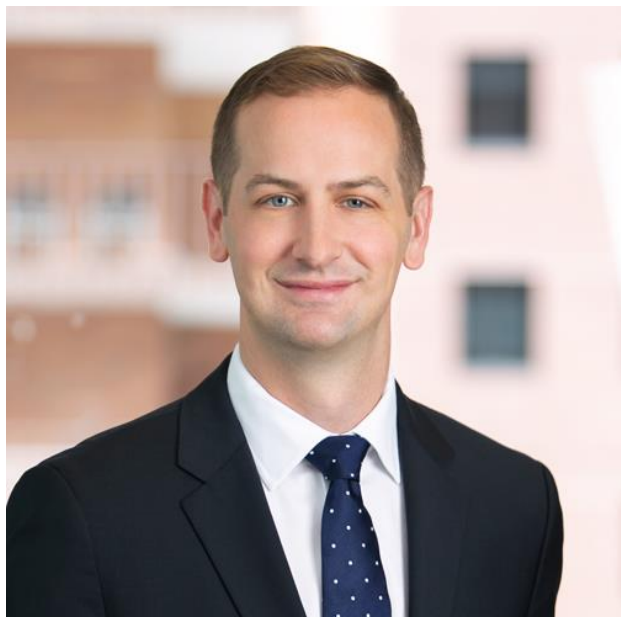


Who Decides and does it Matter?

Life After Chevron

Fall 2024 A2HA Meeting

Alexandria, VA



Ben Fee
Attorney, Hall Render
bfee@hallrender.com
(319) 400-1287



Raminta Kizyte
Attorney, Hall Render
rkizyte@hallrender.com
(303) 557-2112

Federal Rulemaking 101





LEGISLATIVE



EXECUTIVE



JUDICIAL

All Three Branches make Federal Law

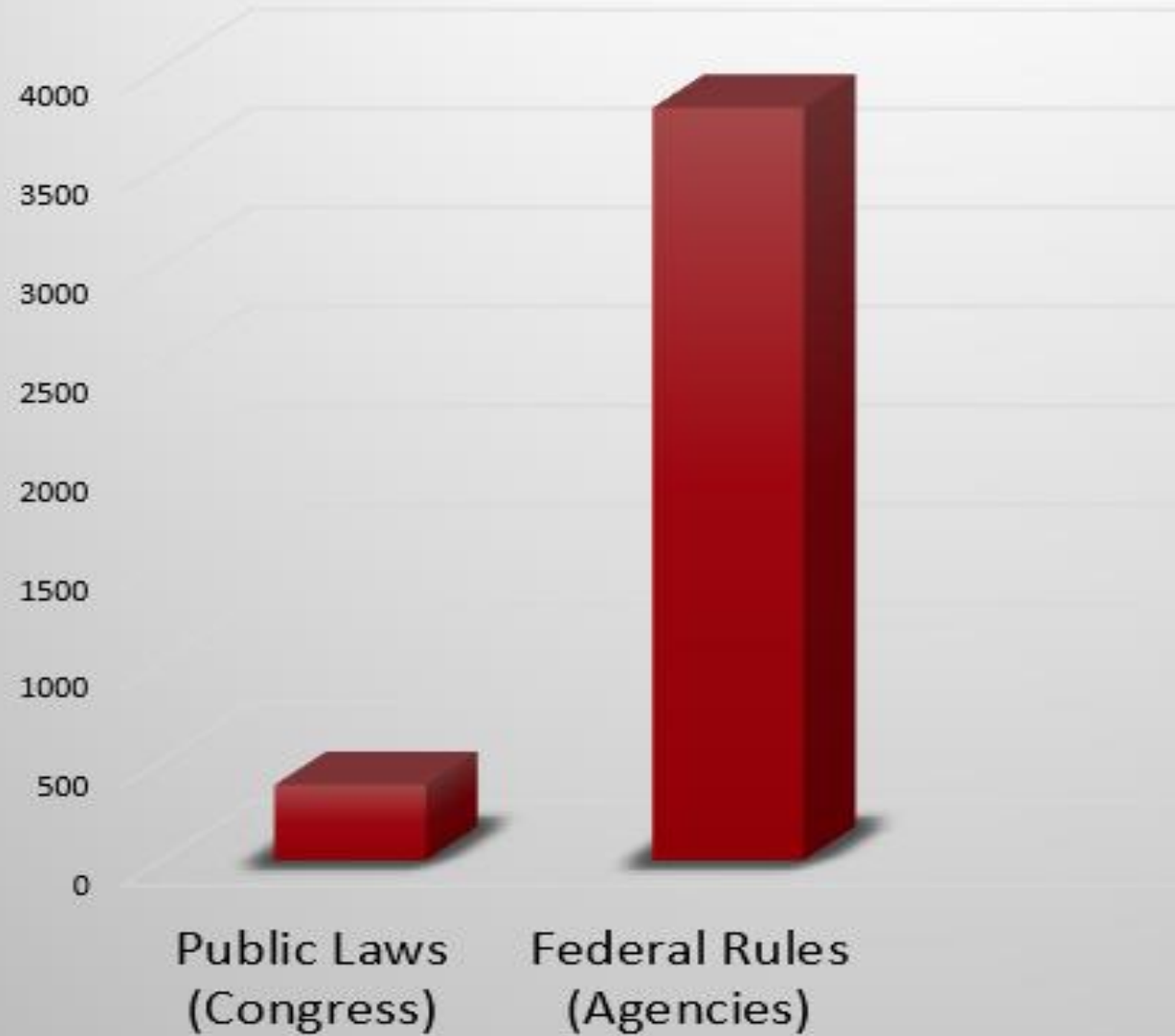


Federal Rules

- Executive Branch creates administrative law
- Expertise and efficiency
- Published as regulations or executive orders
- 439 agencies and sub-agencies (HHS has 13 operating divisions)
- Administrative Procedures Act governs the process for issuing regulations (a mini-Constitution for agencies)

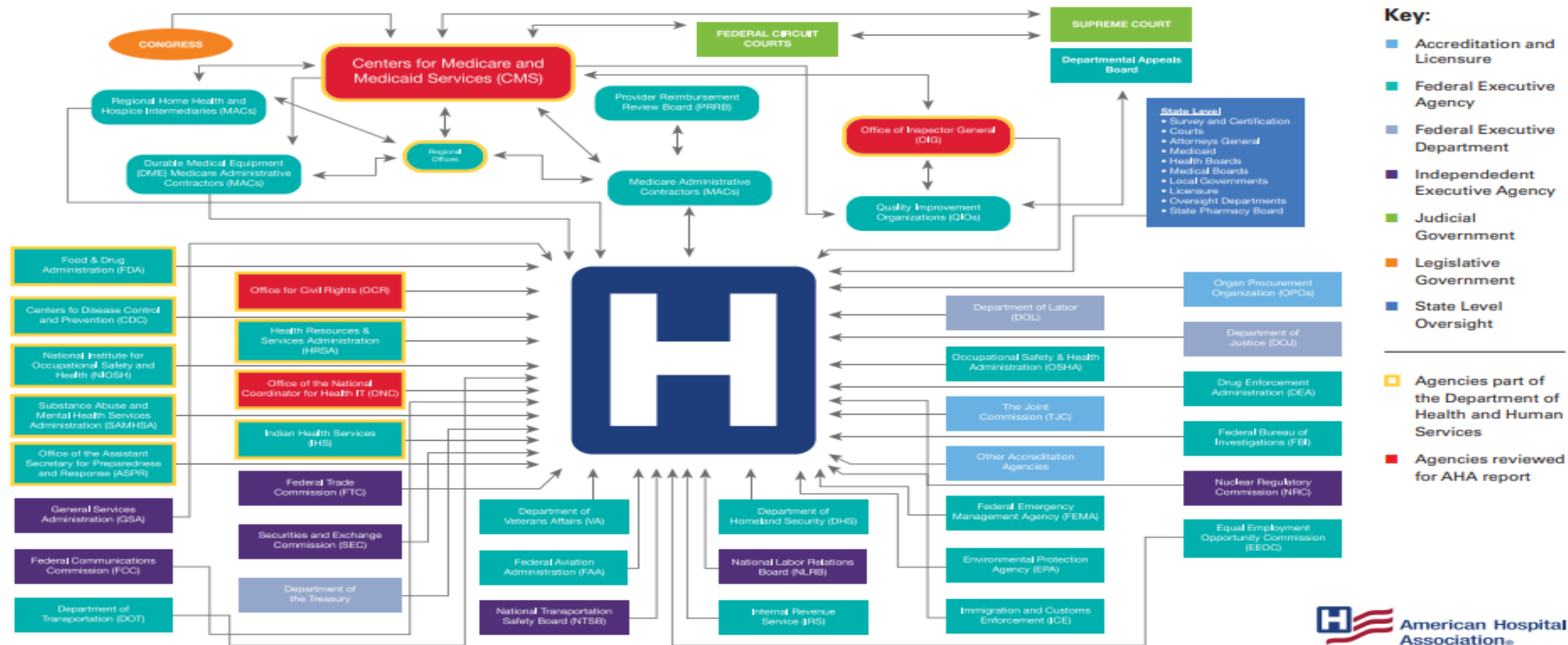


Who Makes Federal Law?



Federal Agencies with Regulatory or Oversight Authority Impacting Hospitals

Four federal agencies account for 629 regulatory requirements that health systems, hospitals and post-acute care providers must comply with, yet providers are subject to regulation and oversight from many other sources.



Chevron and Agency Deference



Agency Deference and Chevron

- Agencies only have what Congress gives them
- If an Agency oversteps or does not follow correct process courts review
- Chevron speaks to that review



Chevron

- How much deference courts should give to administrative agencies when interpreting ambiguous laws.
- Two step analysis:
 - Whether Congress has directly spoken to the precise question at issue (ambiguity)
 - Whether the agency's interpretation of the statute is reasonable.
- If an Agency's interpretation of an ambiguous statutory provision is reasonable, that interpretation is entitled to deference

Example: Hospital Price Transparency

Each hospital operating within the United States shall for each year establish (and update) and make public (in accordance with guidelines developed by the Secretary) a list of the hospital's standard charges for items and services provided by the hospital, including for diagnosis-related groups established under section 1395ww(d)(4) of this title.

- For years this was interpreted as only requiring hospitals to post chargemaster
- In 2019 HHS relied on that one sentence to create the Hospital Price Transparency Rule
- AHA and others challenged in federal court arguing
 - HHS exceeded statutory authority
 - violates 1st Amendment
 - arbitrary and capricious under APA

- Challengers: “Standard charges” is an **unambiguous** term that can only refer to a hospital’s chargemaster charges, and the term cannot be stretched to apply to custom negotiated charges with third-party payers
- Agency: Disputed that “standard charges” refers to chargemaster rates and maintains that **its interpretation**, which accounts for the rates that are actually paid and the different types of patients and payers in the market, **is either the best reading of the statute, or** at minimum, **a reasonable one.**

- The **Court's role** is limited to “determin[ing] . . . as a matter of law the . . . record permitted the agency to make the decision it did
- But **where a statute is ambiguous** and “Congress has explicitly left a gap for the agency to fill,” **the Court must determine “whether the agency’s answer is based on a permissible construction** of the statute.” Chevron, 467 U.S. at 843.
- “Plaintiffs’ argument that “standard charges” **unambiguously means “chargemaster charges” is unpersuasive**. But that does not resolve the statutory question, as under Chevron step two, **CMS’s interpretation must still be reasonable**.
- To be sure, there **may have been other reasonable interpretations** of the statute. **The Court** is “mindful[, however,] that [its] **role is** not to determine . . . the most reasonable interpretation of the statute, but **to make sure that the [agency’s] interpretation is reasonable**, that is, ‘rational and consistent with the statute.’

Would a Court decide differently today?

More Examples

Example #1 – When Chevron Utilized

- Under Medicare, reimbursements to hospitals are adjusted to reflect “differences in hospital wage levels” across “**geographic areas.**”
- The court reasoned that "geographic area" is an ambiguous term within the Medicare Act.

Example #2 – When Chevron Utilized

- Under the Public Health Service Act, the FDA regulates “biological products,” including “proteins.”
- When does an alpha amino acid polymer qualify as such a “protein”?

Loper Bright Enterprises



FishWatch.gov

Loper

- HELD: Courts must exercise independent judgment when deciding whether an agency acted within its statutory authority.
- Chief Justice Roberts: “Chevron’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.”
- Based on APA analysis

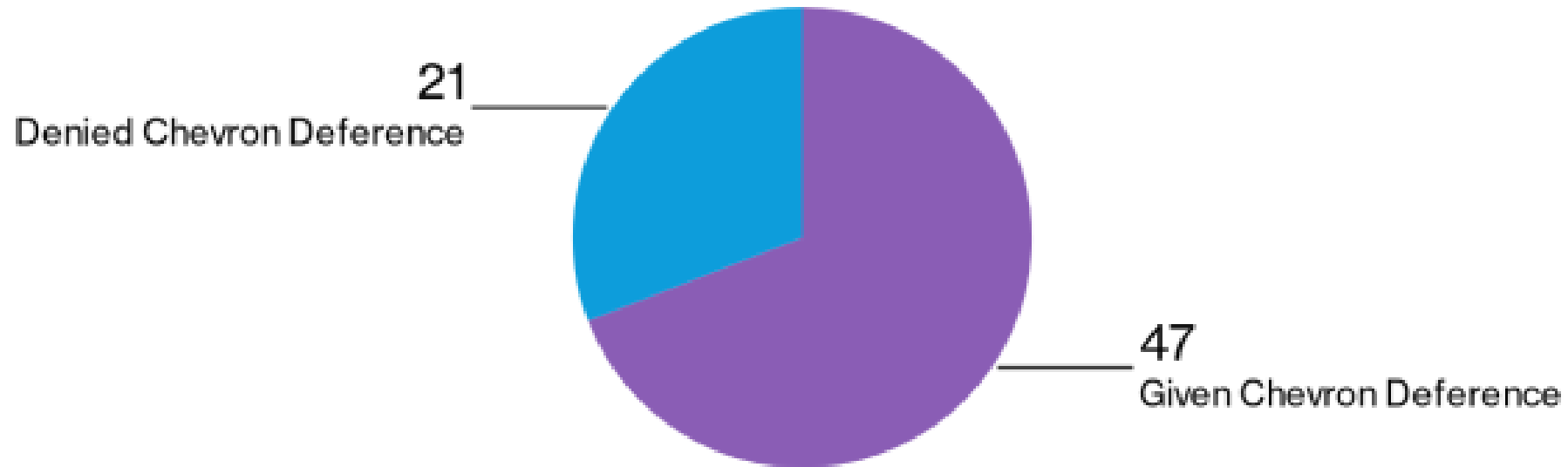


Not a Big Deal?

- The legal commentary has run the gamut from “massive power grab” to “not much will change.”
- Power Grab:
 - overturns doctrine that existed for 40 years
 - balance of power shifts to courts
 - Agencies will change how they make rules
- No big deal:
 - Courts already ignored: some federal Courts were already growing reluctant to apply *Chevron*
 - *Chevron* application already narrow
 - Agencies still make rules
 - Will take years
 - Congress can act

Federal Agencies Are Overwhelmingly Given Chevron Deference

Federal court cases deciding Chevron deference, 2022-2024

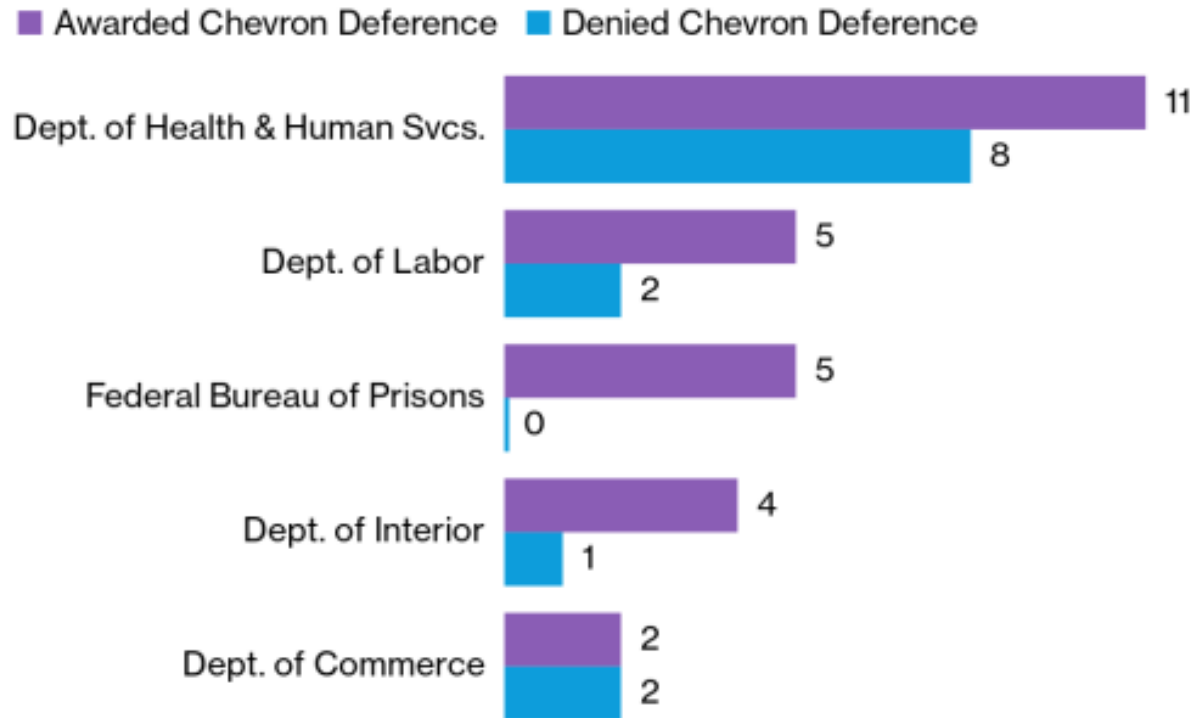


Source: Bloomberg Law BCite search, from Jan. 1, 2022 to Jan. 29, 2024.

Bloomberg Law

Chevron Deference Most Contested at HHS, Often Awarded to Agency

Top contested agency action claims under Chevron, 2022-2024



Source: Bloomberg Law BCite search, from Jan. 1, 2022 to Jan. 29, 2024.

Bloomberg Law



Post *Loper* - Congress

- Clear and specific delegation
- More detailed legislation
 - Question whether first is likely and whether second is possible
- Overturn decision via new legislation
 - But court could base next decision on Constitutional grounds



Post *Loper* – Agencies

- Slower and more cautious rulemaking
- Cannot rely on ambiguous interpretations of the law
- More litigation (arbitrary and capricious)

Post Loper - Courts

- Increased litigation?
- Do courts have necessary expertise?
- Amicus Briefs given more weight?
- Retroactive application: does not directly invalidate previously upheld regulations

Other Cases



Lake Region Healthcare Corporation – Decided September 3, 2024

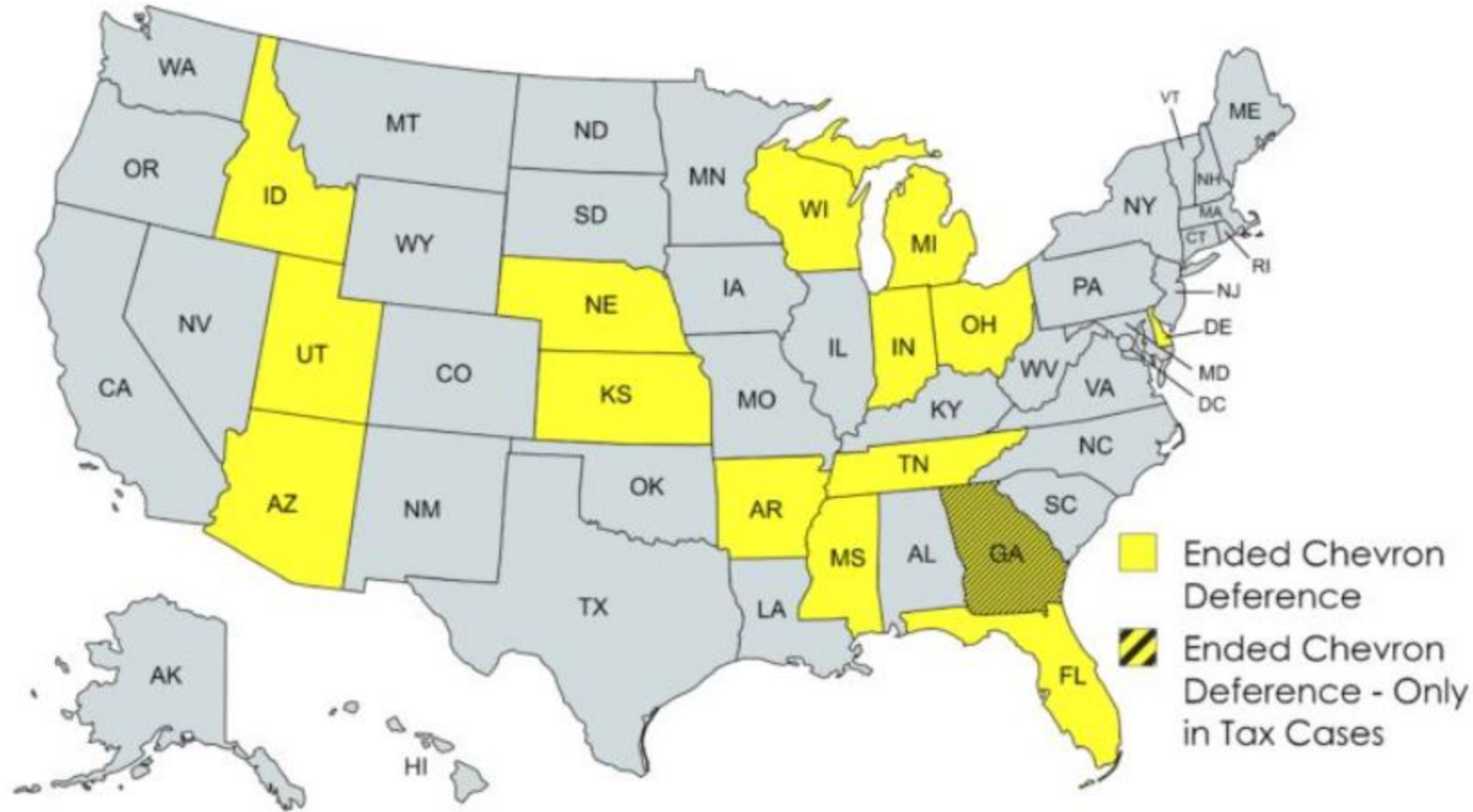
- Issue: Qualifying hospitals that treat Medicare patients are entitled to an extra payment known as a volume-decrease adjustment, which must “**fully compensate**” the hospital for its “**fixed costs.**”
- District Court (lower): deferred to HHS’s reading of the statute under Chevron.
- U.S. Court of Appeals (higher): “Chevron has now been overruled, so we must “exercise independent judgment” in construing the statute.



Corner Post

- Extends limitations period for challenging agency actions under the Administrative Procedure Act (“APA”).
- 6-year limitations period does not begin to run until a claim accrues with the plaintiff.
- Gives new entrants not in existence when a regulation issued an opportunity to challenge it afresh.

States and Chevron



Discussion