The Trump Administration is about to embark on overruling a key regulation protecting endangered species. That regulation, which the Supreme Court upheld in the *Sweet Home* case (1995), protects members of endangered species from being killed or injured indirectly via destruction of their habitat. The Administration does not see *Sweet Home* as a barrier, because that case applied the *Chevron* doctrine in reaching its result.

Under *Chevron*, courts upheld reasonable agency interpretations of statutes. *Chevron* was later overruled, however. The Administration is wrong, however, to believe that this entitles it to ignore *Sweet Home*.

By overruling Chevron in *Loper Bright*, the Court was not reopening the validity of past statutory interpretations by courts. On the contrary, the Court made it clear that overruling *Chevron* left intact the past decisions holding that past regulations were valid. The Court's language is worth a careful look:

> "The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology. Mere reliance on *Chevron* cannot constitute a ' "special justification" ' for overruling such a holding, because to say a precedent relied on *Chevron* is, at best, 'just an argument that the precedent was wrongly decided.' That is not enough to justify overruling a statutory precedent."

As the Court said in an earlier case which it cited in this passage, "Principles of stare decisis, after all, demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends."

***Sweet Home* should not be overruled.** The Court in *Loper Bright* quoted an earlier case that set out some factors that are relevant to whether to overrule a past decision interpreting a statute, beyond whether the later court disagreed with it: ""the quality of [the precedent's] reasoning, the workability of the rule it established,. . . .and reliance on the decision." The habitat protection regulation easily passes this test.

Quality of the Analysis in Sweet Home. The Court undertook an extensive analysis of the statute in *Sweet Home*. It observed that the statutory definition of "take" included "harm," and the latter term includes habitat changes that lead to injury or death of a member of the species. Excluding habitat damage from the statute's coverage would be inconsistent with the statute's purpose and its broad and comprehensive nature. Most tellingly, it would render nugatory section 10 of the statute, which provides a permit system for some

"incidental takes" and would have almost no application if the statute failed to cover habitat modifications.

Workability. There's no evidence of which I'm aware that courts have found it unusually difficult to determine when a habit modification becomes a take, which requires a finding that it proximately causes an injury or death to a member of the species.

Reliance. Use of the incidental take provision has been extensive, a testimony to the way that limits on habitat modification have resulted from *Sweet Home*. Those habit modifications have undoubtedly affected not only those specific habitats but development in surrounding areas.

Putting all these factors together, the case for overruling *Sweet Home* is weak.

The agency has discretion over defining "harm" and must make a reasoned policy decision. *Sweet Home* did not say that the statute requires defining "harm" to include habitat modification. Instead, the Court ruled that: "the proper interpretation of a term such as 'harm' involves a complex policy choice" and that "Congress has entrusted the Secretary with broad discretion."

Nothing in *Loper Bright, t*he case that overruled the *Chevron d*octrine*,* precludes a court from interpreting a statute to provide such discretion. On the contrary, *Loper Bright* explains how judges should handle cases where Congress has delegated authority to an agency. In those cases, a judge should determine the outer limits of discretion and then determine whether the agency made a reasoned choice within those limits. The Court followed that path in *Sweet Home*.

The Trump Administration's passing discussion of *Sweet Home* seems to interpret *Loper Bright* to say that past regulations upheld under *Chevron* are really unlawful because they do not represent the best reading of the statute, but have a kind of immunity to being overturned by courts.

That interpretation of *Loper Bright* is implied by the way the Administration brushes aside the question of whether a past interpretation has been the subject of reliance. According to the Administration, reliance interests can generally be ignored because in all but the rarest cases, the executive has a duty to correctly follow the law that outweighs any reliance interest. But that argument assumes that it would be unlawful for the agency to keep (or reenact later) the existing habitat regulation. Since *Sweet Home* said that the agency had discretion and *Sweet Home* is still a valid precedent, then this premise is wrong: the agency

does have lawful discretion to continue following the existing regulation.

The Administration must make a reasoned policy decision that takes into account all the relevant factors including reliance. The Administration's argument against considering reliance is wrong for another reason. The idea is that since the President must faithfully execute the laws, reliance on incorrect interpretation can't matter (or hardly ever matters). But this is inconsistent with the way that courts handle statutory stare decisis. Courts also have a duty to correctly follow the law. Yet courts believe that it is permissible to follow something other than what they currently believe is the correct meaning of a statute when a past precedent has been the subject of reliance. Courts definitely don't believe that reliance is irrelevant in all except the rarest cases.

To summarize, under *Loper Bright, Sweet Home* remains a valid precedent that interprets the statute to give the agency discretion over whether to define harm to include habitat modification. If it wishes to change the existing interpretation, the agency must give a reasoned argument for doing so that discusses the relevant policy issues, including reliance and the impact of its decision on endangered species. It has failed to do so.