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U.S. SENATOR for MISSOURI

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THE POST-CHEVRON WORKING GROUP REPORT

By: Sen. Eric Schmitt, Chairman

This report is issued by the Working Group's Chairman, Sen. Eric Schmitt (R-MO). It may not reflect the views of totality of the views of the other of the Working Group and this report's contents should not be ascribed to their offices without their public, express consent.

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Executive Summary

The Post-*Chevron* Working Group Report is solely the work product and views of Senator Eric Schmitt.[1] This report is broken down into three sections: 1. Proposed Legislative Response to *Loper Bright*; 2. Analysis of the Administrative State's unpreparedness for and hostility toward *Loper Bright*; and 3. Legislative Drafter's Guide to Deference, Delegation, and Discretion.

Legislative Proposals: A series of Short Term priorities, Medium Term projects, and Long Term goals are required to seize this rare "wet cement" moment for our separation of powers.

- Short Term priorities: Five proposals for the Congressional Review Act and three regulations that may be a new target for litigation.
- Medium Term projects: Ten existing or forthcoming legislative proposals to increase Congressional leverage over the Administrative State and weaken its capacity to harm.
- Long Term goals: Three long term proposals to reset the board and redefine the relationship between Article I and the Administrative State, challenging the Administrative State's core thesis: that only unaccountable bureaucratic elites possess the skill and expertise to create the rules of the game for a modern state.

The Administrative State's unpreparedness for and hostility to *Loper Bright*: An analysis of the responses (and non-responses) of the 101 administrative agencies who have published fifty or more final rules since the year 2000 in the Federal Register. This section discusses the Good, the Bad, and the Ugly of our received responses. It also discusses those agencies "Gone Fishing" who did not take the time to respond to a group of twenty Senators' serious inquiry.

- The Good: A few agencies showed a willingness to adapt to *Loper Bright*.
- The Bad: No agency adequately prepared for and addressed the overruling of *Chevron*.
- The Ugly: Twenty-seven agencies told us little more than to consult the Federal Register.
- Those Agencies "Gone Fishing:" Twenty did not even bother to respond to our inquiry.

The Legislative Drafters Guide to Deference, Delegation, and Discretion: A practical primer for members and legislative staff on how to think about, spot, and deal with three of administrative law's most statutory concepts: deference, delegation, and discretion.

- Deference: When courts defer to an agency interpretation instead of evaluating it.
- Delegation: When Congress delegates authority to make, interpret, or enforce rules.
- Discretion: When Congress allows agencies to make discretionary decisions.

[1] Working Group membership includes: Sen. Eric Schmitt (R-MO) (Chair), Sen. Kevin Cramer (R-ND), Sen. John Cornyn (R-TX), Sen. Rick Scott (R-FL), Sen. Cynthia Lummis (R-WY), Sen. Joni Ernst (R-IA), Sen. Ted Cruz (R-TX), Sen. Mike Lee (R-UT), Sen. Ted Budd (R-NC), Sen. Tommy Tuberville (R-AL), Sen. Thom Tillis (R-NC), Sen. Pete Ricketts (R-NE), Sen. Mike Braun (R-IN), Sen. Roger Marshall (R-KS), Sen. Bill Hagerty (R-TN), Sen. Jon Thune (R-SD), Sen. Marsha Blackburn (R-TN), Sen. Rand Paul (R-KY), Sen. Ron Johnson (R-WI), and Sen. Dan Sullivan (R-AK). This report is issued by the Working Group's Chairman, Sen. Eric Schmitt (R-MO). It may not reflect the views or totality of the views of the other 19 members of the Working Group and this report's contents should not be ascribed to their offices without their public, express consent.

Introduction

Following the Supreme Court's overruling of the *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo*, [2] Congress must act. While the overruling of the *Chevron* doctrine was widely expected,[3] Congress has sat on its hands in the months that have followed. *Loper Bright* changed the administrative law landscape and the relationship between the Executive and Judicial branches.

In response, twenty GOP Senators banded together to form the Working Group both to diagnose what this change meant for the Legislative Branch and chart a forward-looking path through this "wet cement" moment for our separation of powers.

"*Chevron* deference was 'not a harmless transfer of power' but a "fundamental disruption of our separation of powers."[4]

The Working Group met on five separate occasions, conducting internal policy discussions, hosting panels of outside experts for broader conversations, and planning out this Working Group Report. During the time the group was meeting, the American people delivered President Trump and the Republican Party a historic electoral mandate to, among many other things, reorganize and replace our out-of-touch, unaccountable, and expensive bureaucratic elite that populate the Administrative State.

The Working Group sought to analyze the *Loper Bright* case, investigate the agency response to the overruling of the *Chevron* doctrine, and, after completing those tasks, propose a path forward for the Article I branch, while reflecting on the implications of the November elections. This report is broken up into three constituent parts, each of which has something to offer Congress:

- **Part I**: The Legislative Response to *Loper Bright*.
- **Part II**: The Administrative State's Unpreparedness and Hostility toward *Loper Bright*.
- **Part III**: The Legislative Drafter's Guide to Deference, Delegation and Discretion.

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[2] Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 412 (2024).
[3] *See, e.g.*, Amy Howe, *Supreme Court Likely to Discard Chevron*, SCOTUS BLOG (Jan. 17, 2024) https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/; James Mcloughlin Jr., Mary Katherine Stukes, and Pierce Werner, *In Loper Bright And Relentless, Supreme Court Returns to High-Stakes Question of Viability of the Chevron Doctrine*, REUTERS (Nov. 7, 2023) https://www.reuters.com/legal/legalindustry/loper-bright-relentless-supreme-court-returns-high-stakes-question-viability-2023-11-07/; Peter Shane, *As the Supreme Court Reconsiders "Chevron Deference," Will Its Ruling Be Monumental or "Meh"?*, WASHINGTON MONTHLY (Feb. 2, 2024) https://washingtonmonthly.com/2024/02/02/as-the-supreme-court-reconsiders-chevron-deference-will-its-ruling-be-monumental-or-meh/.
[4] *Loper Bright*, 603 U.S. at 416 (Thomas, J., concurring).

Taken together, these different parts chart a path forward, laying out what Congress can do legislatively, re-learning that Congress cannot rely on the Administrative State, and explaining how we can keep the problem from continuing. Congress must have a more rigorous approach to writing laws—drafting legislative text that actually reflects what Congress want laws to do—rather than outsourcing that responsibility to unelected, unaccountable bureaucrats.

I am not trying to say I believe every civil servant in the Administrative State is evil, lazy, or liberal, although there are many bad actors.[5] Instead, I argue to my fellow lawmakers and Americans that the core thesis of the Administrative State is antithetical to our republican form of government: that only unaccountable bureaucratic elites possess the skill and expertise to create the rules of the game for a modern state. In our system, the People elect their leaders. We must jump through the breach created by *Loper Bright* and end this perversion.

From the *Loper Bright* opinion:

> To provide "practical and real protections for individual liberty," the Framers drafted a Constitution that divides the legislative, executive, and judicial powers between three branches of Government. *Chevron* deference compromises this separation of powers in two ways. It curbs the judicial power afforded to courts, and simultaneously expands agencies' executive power beyond constitutional limits.[6]

I present this report as a roadmap for the Article I branch to navigate the historic opportunity created by the Supreme Court's overruling of the *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo*. This report also has a mission to document for ourselves, our constituents, scholars, and future generations curious about the Administrative State and the Senate's real-time response to this watershed moment in administrative law.

As a constitutionalist dedicated to restoring our separation of powers, I diagnose the Administrative State's usurpation of legislative and executive power, reflect on the 2024 electoral mandate to dismantle unaccountable bureaucracy, and propose transformative reforms to upend the deep state, which severely harms all three branches of government. Reining it in is a top priority for those who wield power in all three constitutional branches.

This report captures deliberations—forged through rigorous policy discussions and expert consultations—and outlines a generational strategy to ensure a government of the People, by the People, for the People, securing the Blessings of Liberty in a revitalized Republican Form of Government.

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[5] Many of these bureaucratic bad actors are already gearing up to thwart democracy by blocking key Trump Administration priorities, according to RMG polling which found over 80% of government managers who voted for Harris planned to resist President Trump and only 17% would follow his instructions. *See* Paul Bedard, *'Resistance' Revealed: Liberal Bureaucrats to Fight Trump*, WASHINGTON EXAMINER (Jan. 12, 2025) https://www.washingtonexaminer.com/news/washington-secrets/3284551/resistance-revealed-liberal-bureaucrats-fight-trump/; *see also* Senator Joni Ernst, *Final Telework Report* (Dec. 4, 2024) https://www.ernst.senate.gov/imo/media/doc/final_telework_report.pdf.

[6] *Loper Bright*, 603 U.S. at 414 (Thomas, J., concurring).

The Trump Administration through 100-days

Through its first 100 days, President Trump's administration has done more to counteract the excess, unaccountability, and unlawfulness of the Administrative State than any administration in history. Specifically, three initiatives are worth highlighting:

1. Executive Order 14192,[7] *Unleashing Prosperity Through Deregulation*.
   a. Directing agencies to eliminate 10 regulations for each new one issued.
2. Executive Order 14215,[8] *Ensuring Accountability for All Agencies*.
   a. Restricting agency independence when interpreting law and issuing regulations.
3. Presidential Memoranda titled *Directing the Repeal of Unlawful Regulations*,[9] applying Executive Order 14219,[10] *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*.
   a. Requiring agencies to review and repeal regulations that are unlawful under 10 watershed Supreme Court decisions, including *Loper Bright*.

The first, on January 31, 2025, President Trump signed Executive Order 14192, titled *Unleashing Prosperity Through Deregulation*, requiring that for every one rule promulgated by an agency, 10 existing rules, that are similar in scope, must be identified for removal. This Executive Order built off of the Trump Administration's "One in, Two Out" Executive Order from his first term[11] and my *ERASER Act*, which would require a One in, Three Out regime.[12]

The second, on February 18, 2025, President Trump signed Executive Order 14215, titled *Ensuring Accountability for All Agencies*. This Executive Order requires every federal agency, including independent ones, to submit significant regulations to the Office of Information and Regulatory Affairs (OIRA) within the White House for review and to align legal interpretations with guidance from the President and Attorney General. This order aims to centralize executive oversight, curb regulatory overreach, and ensure agencies adhere to statutory limits. While E.O. 14215 strengthens accountability in Article II, it amplifies the urgency for Article I to act through the legislative proposals, oversight reforms, and precise drafting outlined in this report.

The third, on April 9, 2025, President Trump issued a Presidential Memoranda, titled *Directing the Repeal of Unlawful Regulations*, which builds off of Executive Order 14219's requirement of the heads of all executive departments and agencies to identify certain categories of unlawful and potentially unlawful regulations within 60 days and begin plans to repeal them. This memorandum further defines the scope of that review-and-repeal effort by mandating that departments and agencies evaluate each regulation's lawfulness under 10 watershed Supreme Court cases impacting the legality of regulations, with *Loper Bright* listed as the leading case.

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[7] Exec. Order No. 14192, 90 Fed. Reg. 9065 (Feb. 6, 2025).
[8] Exec. Order No. 14215, 90 Fed. Reg. 10447 (Feb. 24, 2025).
[9] *See* Presidential Memoranda, Directing the Repeal of Unlawful Regulations (Apr. 9, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/.
[10] Exec. Order No. 14219, 90 Fed. Reg. 10583 (Feb. 25, 2025).
[11] Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017).
[12] Expediting Reform And Stopping Excess Regulations Act or the ERASER Act, S.30, 119th Cong. § 1 (2025).

Part I: The Legislative Response to *Loper Bright*.

In the first half of the 20th Century, Congress established many institutions aimed at professionalizing the bureaucracy, centralizing power, and transforming our democracy into a technocracy, culminating in the 1947 passage of the Administrative Procedure Act. However noble (or ignoble) their intentions behind these institutions, the government that they have created is unrecognizable to the government established by our Founding Fathers. Ambition cannot counter ambition when the mandate to succeed legislatively has been removed. The current power exists in the hands of faceless bureaucrats, exercising power authorized by long forgotten legislators to address tangible issues that were sorted out in decades past. The only item left for Congress is the ministerial task of turning on the funding spigot.

Following the overruling of the *Chevron* doctrine, I believe that Congress must act. This "wet cement" moment has created the opportunity for meaningful legislative reform to the Administrative State. However, while turning over the powers of the government to the People's elected representatives in Congress and in their state and local governments should be a universal rallying cry, this issue, unfortunately, appears to be deeply partisan. While the Republicans will control the Presidency and both chambers of Congress during the 119th Congress, the likelihood of passing meaningful reform at a sixty-vote threshold in the Senate is uncertain. To overcome partisan opposition, Congress must act and think generationally.

There are three buckets of action for Congress to fight the Administrative State and reorient our government toward its proper design: 1. Short Term priorities; 2. Medium Term projects; and 3. Long Term goals.

1. **Short Term priorities.** These are the priorities that can be drafted by the current GOP majorities and signed into law by President Trump. They are passable at a fifty-vote threshold and are by no means the end of the conversation. These are the wins we can get today while continuing our assault in tomorrow's battles.
2. **Medium Term projects.** These are the projects currently underway in the Senate, legislative fixes to problems created by the Administrative State. They are not a cure all. These projects remedy a specific problem created by the Administrative State and create more leverage over the Administrative State but are not designed to upend the status quo and challenge the core thesis of the Administrative State.
3. **Long Term goals.** These reject the main thesis of the Administrative State and are aimed at ending the technocracy. Do we live in a regime where the duly elected legislature exercises the "expertise" and drafts legislation in detail or do we live in a regime where the Environmental Protection Agency is able to ruin a multigenerational family farm with the stroke of a pen? We want Senators who exercise real power and create real legislation instead of solely sending strongly worded letters. Elected officials must no longer acquiesce and defer to our "expert" masters in the Administrative State.

Short Term Priorities

In the short term, our options are limited to processes the GOP controls, legislative options that can pass at a simple majority threshold, and assisting the ongoing fight in the courts. These are useful hills to climb. Combined with Part III of this report, *The Republican Legislative Drafters Guide to Deference, Delegation, and Discretion*, these priorities require only intra-conference buy-in.[13]

First, I believe that the GOP must cut funding to the federal bureaucracy. The Article I branch controls the power of the purse, but we do not jealously guard the taxpayers' dollars. It is high time we abandon the "new normal" of continuing resolutions and propose actual appropriations bills. The Trump administration can make countless brilliant cost-saving recommendations but if we continue to appropriate the money, the bottom line will not change. I think that if we want to trim the bloat and redundancies of the civil service, we need not bother with the cumbersome process of worrying about *Loudermill*[14] hearings and public sector collective bargaining agreements, we only need our appropriators to take a stand. Mass reduction in force actions does not have the same hurdles to jump through as piecemeal termination of one-off inefficient employees.

Second, I support continuing to utilize the Congressional Review Act process to remove as many harmful Biden regulations as possible. There are a low number of consequential regulations available for removal under the CRA, as opposed to the similarly situated Republican trifecta coming into power in 2017. However, that number is not zero. If Congress adopts the view that regulations finalized but never officially submitted to Congress are CRA-eligible, the universe of regulations that can be repealed expands dramatically. Each bad regulation pulled off the books is a private sector career saved, an afternoon of a constituent spending time with family and not on compliance recovered, and a lightening of the overall regulatory burden. Below, I discuss some particularly bad regulations that this Senate has voted to disapprove of using the CRA.[15]

Third, the conservative legal movement must challenge those illegitimate regulations that were litigated to finality under *Chevron* prior to that doctrine's overruling. Although there are open questions about the stare decisis effect of cases previously litigated to finality under

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[13] The Working Group debated and discussed many internal changes to Congress that could increase Congressional leverage over the Administrative State: reforming the Legislative Counsel's office and GAO; modernizing the Federal Register, and establishing a Congressional Regulation Office. All of these are good, but internal, proposals.
[14] Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545-546 (1985).
[15] *See* Clyde Wayne Crews, Jr., *An Inventory of Biden Regulations to Overturn Quickly in the 119th Congress*, FORBES (Dec. 29, 2024) https://www.forbes.com/sites/waynecrews/2024/12/29/an-inventory-of-biden-regulations-to-overturn-quickly-in-the-119th-congress/.

Chevron.[16] Below, I discuss five particularly troublesome regulations that can be repealed under the CRA.

Five Regulations the Senate Disapproved of using the Congressional Review Act

Waste Emissions Charge for Petroleum and Natural Gas Systems.[17]

- **Date Nullified**: March 14, 2025
- **Discussion**: This was an outflow from the Inflation Reduction Act with the justification that it would result in less wasted petroleum and natural gas. In reality, it was a safety tax. This final rule set out how businesses providing petroleum and natural gas would be charged for any leaks that resulted during their manufacturing process. Regulated producers would have been charged $900 per metric ton of emissions in 2024, increasing to $1,200 for 2025, and $1,500 in the following years. While this was justified as a means of making production more efficient and thus cheaper for the consumer, it was simply adding more expenses to the manufacturing process that will likely increase cost.
- **CRA Information**: H.J.Res.35, became Public Law No. 119-2.

Protection of Marine Archaeological Resources.[18]

- **Date Nullified**: March 14, 2025
- **Discussion**: This rule required operators and lessees conducting oil and gas exploration or development on the Outer Continental Shelf that were seeking Bureau of Ocean Energy Management (BOEM) approval for such activities to also provide BOEM with an archaeological report for the area of potential effects. The report must have identified potential archaeological resources (material remains of human life or activities that are at least 50 years old and that are of archaeological interest) on the sea floor. This rule was a modification of regulations that only required such a report when a BOEM regional director had reason to believe that an archaeological resource may be present in the lease area, increasing the burdens and costs associated with exploration and development in the oil and gas industry without justification. It was an unnecessary restriction on the expansion of the energy industry, adding expenses that would likely be passed on to consumers.
- **CRA Information**: S.J.Res.11, became Public Law No. 119-3.

[16] *See e.g.,* Eli Nachmany, *Deference Undisturbed*, 101 NOTRE DAME L. REV. (forthcoming 2025).
[17] 89 Fed. Reg. 91094 (Nov. 18, 2024) (to be codified at 40 C.F.R. pts. 2, 98, 99).
[18] 89 Fed. Reg. 71160 (Sept. 3, 2024) (to be codified at 30 C.F.R. pt. 550).

Gross Proceeds Reporting by Brokers That Regularly Provide Services Effectuating Digital Asset Sales.[19]

- **Date Nullified**: April 10, 2025.
- **Discussion**: This Internal Revenue Service (IRS) rule, finalized on December 27, 2024, under the Infrastructure Investment and Jobs Act, expands the definition of "broker" to include both custodial and non-custodial participants (e.g., decentralized finance platforms or DeFi) in digital asset transactions. It requires these brokers to report gross proceeds from digital asset sales via Form 1099, aiming to curb tax evasion. Critics, including the Blockchain Association and Texas Blockchain Council, argue the rule overreaches by treating non-custodial entities as brokers, imposing burdensome reporting requirements that stifle innovation and raise compliance costs (estimated at 360 hours per entity annually). The rule could hinder peer-to-peer blockchain transactions, increase costs for digital asset platforms, and potentially drive businesses offshore, while proponents claim it ensures tax compliance for digital assets.
- **CRA Information**: S.J.Res.3, introduced by Sen. Ted Cruz (R-TX) on January 21, 2025, passed the Senate by a 70–27 vote on March 4, 2025. Identical to H.J.Res.25, became Public Law No. 119-3.

Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications.[20]

- **Date Nullified**: May 9, 2025.
- **Discussion**: This Consumer Financial Protection Bureau (CFPB) rule, finalized on December 12, 2024, and published on December 30, 2024, establishes supervisory authority over nonbank companies providing general-use digital consumer payment applications (e.g., digital wallets like PayPal, Venmo, or Apple Pay) with at least 50 million annual consumer payment transactions. The rule subjects these “larger participants” to CFPB examinations for compliance with consumer protection laws, aiming to ensure fair, transparent, and competitive markets. Critics, including Republican lawmakers and industry groups like the U.S. Chamber of Commerce, argue the rule imposes excessive regulatory burdens, increases compliance costs, and stifles innovation in the fintech sector. They contend it could raise costs for consumers using digital payment platforms and that existing regulations sufficiently address consumer protections. Supporters claim the rule closes oversight gaps for rapidly growing digital payment providers.

[19] 89 Fed. Reg. 106928 (Dec. 30, 2024) (to be codified at 26 C.F.R. pt. 1)
[20] 89 Fed. Reg. 99582 (Dec. 10, 2024) (to be codified at 12 C.F.R. pt. 1090).

- **CRA Information**: S.J.Res.28, introduced by Sen. Pete Ricketts (R-NE) on February 27, 2025, provides for congressional disapproval under chapter 8 of title 5, United States Code, of the CFPB rule. It passed the Senate by a 51–47 vote on March 5, 2025, and the House by a 219–211 vote on April 9, 2025. The resolution awaits President Trump's signature to become law.

EPA Waiver for California Vehicle Emissions Standards[21]

- **Date Nullified**: Not yet nullified (Passed House and Senate on May 22, 2025; awaiting presidential signature)
- **Discussion**: This Environmental Protection Agency (EPA) waiver, granted under Section 209 of the Clean Air Act and submitted to Congress in February 2025, allows California to set stricter vehicle emissions standards than federal levels, including mandates for zero-emission vehicle (ZEV) sales under programs like Advanced Clean Cars II (ACC II). The waiver aims to reduce air pollution and promote electric vehicle (EV) adoption, aligning with California's goal to phase out gas-powered cars by 2035. Critics, including Republican lawmakers and industry groups, argue the waiver oversteps federal authority, imposes burdensome regulations on automakers, and disadvantages states that follow federal standards, potentially increasing costs for consumers.
- **CRA Information**: H.J.Res. 87, introduced by Rep. John James (R-MI) on April 2, 2025, provides for congressional disapproval under chapter 8 of title 5, United States Code, of the EPA waiver. It first passed the House and then passed the Senate by a 51–45 vote on May 22, 2025. The resolution awaits President Trump's signature to become law as of May 26, 2025.

[21] 88 Fed. Reg. 20688 (Apr. 6, 2023).

Three Candidates for Litigation and Congressional Action

Because of the Supreme Court's refusal to apply *Chevron* deference in the years leading up to *Loper Bright* and its simultaneous development of the Major Questions Doctrine (MQD), no Biden-era regulations have been upheld by the Court on *Chevron* grounds and only a rare few, typically those falling outside of the MQD, have been granted deference by the lower courts. I list three examples—most from prior to the Biden Administration—below:

Mandatory Abortion Referrals & Separation between Title X-funded Projects and Abortion.[22]

- **Statutory Context:** The statutory provision at issue, 42 U.S.C. § 300a-6, states: "None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning" but does not define "program" or address program-integrity requirements.
- **Agency Context:** The 2021 HHS Rule:
    - Eliminated strict program-integrity requirements from the 2019 Rule, which had mandated physical and financial separation between Title X-funded projects and abortion-related activities.
    - Reinstated a referral mandate, requiring Title X projects to refer patients for abortion services upon request as part of nondirective counseling.
- **Recent Cases**
    - In *Ohio v. Becerra*, 87 F.4th 759 (6th Cir. 2023), the Sixth Circuit found the statute ambiguous and employed *Chevron* deference to uphold HHS's rule.
    - In *Tennessee v. Becerra*, 117 F.4th 348 (6th Cir. 2024), **the Sixth Circuit reconsidered the 2021 HHS rule in light of *Loper Bright* but still upheld it** because of the Supreme Court's guidance on not overturning cases that relied on *Chevron*.

Full Due Process Hearings for Illegal Aliens Facing Deportation.[23]

8 C.F.R. § 208.31 (February 19, 1999), Reasonable fear of persecution or torture determinations involving aliens ordered removed under section 238(b) of the Act and aliens whose removal is reinstated under section 241(a)(5) of the Act.

- **Context:** 8 C.F.R. § 208.31 establishes procedures for assessing whether individuals subject to expedited removal or reinstated removal orders have a *reasonable fear of persecution or torture*, which could make them eligible for withholding of removal or protection under the Convention Against Torture.

[22] Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services, 86 Fed. Reg. 56144 (Oct. 7, 2021) (codified at 42 C.F.R. pt. 59).
[23] Clarification Regarding Bars to Eligibility During Credible Fear and Reasonable Fear Review, 89 Fed. Reg. 105392 (Dec. 27, 2024) (codified at 8 C.F.R. 1003, 1208).

- **Recent Case:** In *Alvarado-Herrera v. Garland*, 993 F.3d 1187 (9th Cir. 2021), the Ninth Circuit found that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 does "not address whether non-citizens who express a fear of persecution or torture are entitled to a "full due process hearing" before an immigration judge on claims for withholding of removal and protection under CAT." The Court then employed *Chevron* deference to uphold 8 C.F.R. § 208.31.

Retirement Plans Managers May Consider ESG Factors.

29 C.F.R. § 2550.404a-1, (Jan. 30, 2022), Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights.

- **Statutory Context:** The Employment Retirement Income Security Act (ERISA) requires retirement plan managers to serve "solely in the interest of [their] participants and beneficiaries" and for "the exclusive purpose of providing benefits" to them.
- **Agency Context:** The Department of Labor (DOL) enacted 29 C.F.R. § 2550.404a-1 to empower retirement plan managers to consider environmental, social, and governance factors in their investment decisions, specifically allowing managers to weigh "collateral benefits other than investment returns."
- **Recent Case:** In *Utah v. Su*, 109 F.4th 313 (5th Cir. 2024), the Fifth Circuit remanded the case to the district court to review the DOL rule in light of the Supreme Court overruling *Chevron*.

Medium Term Projects

In the medium term, there are a number of promising projects already underway in the U.S. Senate. These projects do not challenge the core thesis of the Administrative State, that the Administrative State has the delegated authority to create the overwhelming majority of the binding edicts placed upon the American people. Rather, each project, in turn, helps to alleviate and rein in the Administrative State, but they do not end the status quo.

These projects are battles worth fighting. However, they are unlikely, in their current form, to be compliant with the Byrd Rule and will have to pass individually, or in a larger package, at a sixty-vote threshold. I will go to the mat for these projects. Under current Senate rules, they will require bipartisan support to pass. Unfortunately, the predominate worldview of our Democratic colleagues is to "trust the experts" by turning over large amounts of delegated authority over discretionary decisions to the Administrative State.

Below are ten existing or forthcoming legislative proposals that are medium-term projects for decreasing the power of the Administrative State with extended writeups on the proposals.

1. **Separation of Powers Restoration Act (SOPRA)**: Modifies the scope of judicial review of agency actions and establishes *de novo* review for administrative agencies' interpretations by amending § 706 of the Administrative Procedure Act (APA).
2. **ERASER Act**: Prohibits an agency from issuing a rule unless the same agency has repealed at least three rules, that to the extent practicable, are related to the rule.
3. **REINS Act**: Requires congressional approval of any major rule proposed by an executive agency, a congressional opt-in regime for the Major Questions Doctrine.
4. **CRA Modernization Act (Forthcoming)**: Removes the time barrier on the CRA and allows Congress to address any published rule and multiple rules in a single resolution.
5. **Super Deference Elimination Act (Forthcoming):** Removes the heightened "Super Deference" standard created by Dodd-Frank, which statutorily enshrines deference.
6. **Guidance Out of Darkness (GOOD) Act**: Requires federal agencies to publish their regulatory guidance on the internet in an easily accessible location.
7. **Regulatory Accountability Act**: Modernizes the APA and requires agencies to be more open and accountable to the public when they propose "high-impact" rules that will have a big effect on businesses, states, and local communities.
8. **Take Care Act**: Removes for-cause removal protection from Principal officers appointed by the President by and with the advice and consent of the Senate under Article II.
9. **D.C. Circuit Jurisdiction Reform Act (Forthcoming)**: Places the jurisdiction of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") on parity with other nation's other Circuit Courts of Appeals, limiting its corrupting influence.
10. **DRAIN Act**: Authorizes OMB to come up with a plan for moving non-security agencies away from Washington by 2029, or whenever the agency headquarters' lease expires.

Separation of Powers Restoration Act (SOPRA)

Introduced by Senator Eric Schmitt (Missouri)

Topline Summary: This legislation modifies the scope of judicial review of agency actions and establishes *de novo* review for administrative agencies' interpretations by amending section 706 of the Administrative Procedure Act.

Statement of Purpose: *Loper Bright* is the culmination of a single battle, not the end of the war against administrative deference standards. One early critique of the *Loper Bright* decision is that, while clear in overruling *Chevron*, the actual standard of review to be applied by a court reviewing an agency interpretation or application of statute remains hard to define. Further, if an agency publishes within its statutory authority, it currently has deference in its interpretation of that rule, giving its guidance documents the same corrosive deference as *Chevron* gave interpretations of the statute itself. This deference standard, named *Auer* deference, is arguably a greater violation of the separation of powers than *Chevron* deference and is entirely untouched by the *Loper Bright* decision.

Overview: SOPRA places a *de novo* standard of review within the text of 5 U.S.C. 706, ending unconstitutional executive deference standards once and for all. Under a *de novo* standard of review, courts will weigh the merits of the argument without a deference standard to either side, placing American citizens and businesses—either caught on the wrong side of a regulatory enforcement action or challenging the validity of agency action—on an equal footing in court with an administrative agency. The House passed this bill in the 118th Congress.

This legislation allows the courts reviewing agency actions to decide all relevant questions of law, including the interpretation of constitutional and statutory provisions, rules made by agencies, interpretive rules, and general statements of policy.

The Administrative Procedure Act outlines the default rules for how judicial review may be used, and so it is within Congress's duty to amend the APA to reflect the changing conditions of administrative law and maintain the separation of powers designated in our Constitution.

As Justice Gorsuch said in his *Loper Bright* concurrence: "In disputes between individuals and the government about the meaning of a federal law, federal courts have traditionally sought to offer independent judgments about 'what the law is' without favor to either side."[24]

Re-establishing the separation of the three governmental powers—Legislative, Executive, and Judicial—is necessary to preserve individual liberty and will be one of the great long-term accomplishments of the incoming Trump Administration. I look forward to leading this fight in the Senate.

[24] Loper Bright, 603 U.S. at 416 (Gorsuch, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

Expediting Reform and Stopping Excess Regulations Act (ERASER)

Introduced by Senator Eric Schmitt (Missouri)

Topline Summary: This legislation requires an administrative agency that issues a new regulation to repeal three existing regulations before the new regulation takes effect.

Statement of Purpose: The Code of Federal Regulations (CFR) continues to expand into an unwieldy leviathan. The number of pages in the CFR has more than doubled since 1980. However, the pages in the CFR do not tell the entire story of the impact of rules and regulations on small businesses. A recent report by the Competitive Enterprise Institute estimates that the current regime of rules and regulations cost Americans just under $2 trillion annually. The ERASER Act provides the framework to ensure government bureaucrats think more critically about new rules and regulations.

Overview: This bill builds upon the 2017 Trump Administration Executive Order (EO) 13771, "Reducing Regulation and Controlling Regulatory Costs," which required agencies to remove at least two regulations when issuing a new one. By 2019, these efforts saved small businesses $733 million in regulation costs. Unfortunately, one of President Biden's first actions was to repeal this successful policy.

This concept of deregulation has also been successfully used in other nations. The United Kingdom first adopted a similar policy in 2005 and then adopted a "one-in, three-out" variant in 2016. As a result of this common-sense deregulation policy, businesses have seen billions of dollars in annual savings from regulatory costs. The success of this policy has prompted Australia and Canada to implement their own comparable deregulation policies.

Specifically, the ERASER Act:

- Prohibits an agency from issuing a rule unless the same agency has repealed at least three rules, that to the extent practicable, are related to the rule.
- Prohibits an agency from issuing a major rule unless the agency has repealed three (3) or more rules AND the cost of the new major rule is less than or equal to the cost of the rules repealed, as certified by the Office of Information and Regulatory Affairs. Major rules include any rules that (a) cost $100 million or more, (b) cause a major increase in costs or prices for consumers or individual industries, or (c) have a significant adverse effect on competition, employment, investment, or innovation of US businesses.
- Clarifies that a repealed rule cannot be an interpretative rule, general statement of policy, or rule of agency organization and ensures a repealed rule went through the notice-and-comment process.

Regulations from the Executive in Need of Scrutiny Act (REINS)

Introduced by Senator Rand Paul (Kentucky)

Topline Summary: This legislation introduces a statutory requirement that "major" agency rules, defined as rules with an estimated economic effect of greater than $100 million or other significant effects, cannot take effect without congressional approval.

Statement of Purpose: Administrative agencies issue draconian rules binding on the American public with few checks and little accountability. These rules have broad effects impacting many areas of the American economy. The lack of meaningful checks on such significant uses of agency power leaves the American people captive to the decisions of unelected bureaucrats in Washington. This bill aims to restore some measure of democratic accountability to this frightening regime.

Overview: This bill amends 5 U.S.C. §§801-808 and outlines the approval process for major rules. The REINS Act designates a rule as "major" if it meets one of four conditions: first, if the estimated annual effect on the economy is greater than $100 million; second, if it results in a significant increase in costs or prices for consumers; third, if the rule produces significant anticompetitive effects; or fourth, if the rule leads to an increase in mandatory vaccinations.

- As with legislative disapproval of agency rules under the existing text of the Congressional Review Act, approval of major rules is by joint resolution. Approval of a major rule under the REINS Act would formally meet the constitutional requirements of bicameralism and presentment. This arrangement would strengthen the constitutional basis of major rules passed with congressional approval relative to the status quo where major rules may be issued by agencies without specific legislative approval of the rule.
- Some may argue that this bill does not go far enough – some important bills will not fall under the purview of the Act and it is only forward-looking, having no effect on existing regulations. Still, this bill is a significant step in the right direction, helping to ensure that agencies cannot issue rules of massive import without the approval of the people's elected representatives in Congress.
- Post-*Loper Bright*, Congress must seize the opportunity to regain its constitutional authority to make laws. The REINS Act accomplishes this objective by subjecting major rules to congressional review before taking effect. This would significantly enhance the democratic accountability of administrative agencies and tie the modern Administrative State more closely to the founding ideals of this country.

CRA Modernization Act

Forthcoming from Senator Eric Schmitt (Missouri)

Topline Summary: This legislation eliminates the time limitation on the application of the Congressional Review Act to agency rules.

Statement of Purpose: The Congressional Review Act (CRA) enables Congress to pass joint resolutions to invalidate agency rules. As it stands, Congress may only exercise its powers under the CRA within 60 days after an agency submits a rule to Congress. This bill would eliminate this 60-day limit on the CRA.

Overview: 5 U.S.C. 801(d) states the time limit on the application of the CRA, applying 5 U.S.C. §802 only to the 60-day period after an agency has submitted its report on a rule to Congress. The bill amends these provisions of the CRA, replacing 5 U.S.C. §801(d)(1) with simple language clarifying that Congress may use the CRA to overturn any agency rule, regardless of the date the rules were issued or the date the agency submitted the report to Congress. The following language is the suggested amendment to 5 U.S.C. §801(d):

"In addition to the opportunity for review otherwise provided under this chapter, section 802 shall apply to any agency rule as defined in section 804(3), regardless of the date of the issuance of the rule or the date of the submission of the agency report to Congress."

- This bill does not alter the requirement for agencies to submit a report to Congress before a rule takes effect. 5 U.S.C 801(d)(2)(B), which reads, "Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect," will remain unchanged.
- The CRA fast-tracks legislative disapproval of agency rules by avoiding the filibuster in the Senate. A successful CRA joint resolution passes both houses of Congress and is presented to the President. 5 U.S.C. §801(b)(2) states that the rule in question "may not be reissued in substantially the same form" by the same or another agency unless authorized by a subsequent law, salting the field in that specific vein of regulation.
- Removing this time limit on the CRA would increase the accountability of the Administrative State since any agency rule, excluding the three exceptions listed in 5 U.S.C. §804(3), could now be subject to a CRA joint resolution. This bill would further empower the people's elected representatives in Congress to check the unaccountable Administrative State.
- This act also allows en bloc disapproval of rules in a *single* resolution, allowing for a compilation of federal rules repeals. This acknowledges that floor time is precious and Congress should have the ability to acknowledge its disapproval with multiple rules at the exact same time. As such an act would be most likely during the beginning of a new Congress, this will expand available time for Congress to act on other pressing matters.

Super Deference Elimination Act

Forthcoming from Senator Eric Schmitt (Missouri)

Topline Summary: This legislation eliminates super deference for the CFPB in the U.S. Code, ensuring that this type of administrative deference does not survive post-*Loper Bright*.

Statement of Purpose: *Loper Bright* overturned *Chevron*, but its other effects on administrative deference are not clear. One remaining question is whether the deference afforded to the CFPB's legal interpretation on issues of consumer financial protection will survive. Like *Chevron* deference, this super deference violates the separation of powers.

Overview: Congress created the CFPB with the 2010 Dodd-Frank Act and intended to consolidate consumer financial protection authorities that had previously existed across multiple agencies into one agency. Dodd-Frank expressly references administrative deference for the CFPB, the only known place in the U.S. Code to do so. Additionally, to aid in the consolidation of consumer financial protection authority, Congress wrote multiple statutory provisions privileging the CFPB's legal interpretation over that of other agencies on issues of consumer financial protection. This privileging of the CFPB's interpretation, termed "super deference," still exists in Dodd-Frank. This appears to be the only place in the U.S. Code where one agency's interpretation is privileged over others where agencies have overlapping authorities.

- This legislation aims to strike the reference to administrative deference in Dodd-Frank in multiple sections of the Act and strike the statutory provisions privileging the CFPB's interpretation of consumer financial law.
- Dodd-Frank states that the CFPB's determination regarding "a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law."[25] Similar language appears in the Truth in Lending Act, Fair Credit Reporting Act, Equal Credit Opportunity Act, and Electronic Fund Transfer Act.
- This legislation would strike such language in these statutes. Some may argue that *Loper Bright* has already rendered "super deference" a dead letter. But it remains to be seen how courts will apply *Skidmore v. Swift, Co.* in interpreting agency legal interpretations, and it is possible that CFPB super deference will live on through the application of *Skidmore*.
- This legislation ensures that super deference will not survive. Super deference for the CFPB, like *Chevron* deference more generally, violates the separation of powers. Passage of this bill would be another victory in the war against the Administrative State, restoring the vision for the federal government that the Founders intended.

[25] 12 U.S.C § 5512(b)(4)(B) (2010).

Guidance Out of Darkness (GOOD) Act

Introduced by Senator Ron Johnson

Topline Summary: This legislation requires federal agencies to publish their regulatory guidance in an easily accessible location on the Internet.

Statement of Purpose: The Administrative Procedure Act (APA) allows agencies to issue guidance documents, interpretative rules, and policy statements without going through the notice-and-comment rulemaking process. While these documents do not carry the force of law, they may remain persuasive in court and, at a minimum, are often treated as binding by businesses, states, and local governments due to their perceived authority. The GOOD Act ensures that all of an agency's guidance is accessible to the public in a centralized, searchable online repository.

Overview: The GOOD Act responds to the problem of obscure regulatory guidance, which can impose significant compliance costs on individuals and businesses. Many agencies rely on nonbinding guidance to effectively create shadow regulations, leading to quasi-constitutional exercises of power, industry-wide confusion, and unnecessary burdens on the general public.

Specifically, the GOOD Act:

- **Mandates Publication**: Requires federal agencies to publish all guidance documents, including interpretative rules and general statements of policy, online in a format that is easily accessible and searchable by the public.
- **Improves Transparency**: Establishes a single, centralized location for guidance documents—managed by the Office of Management and Budget—enabling individuals and businesses to quickly find and review all relevant regulatory materials.
- **Archive Inoperative Guidance**: Mandates that agencies retain and label guidance no longer in effect on the online catalog and include an explanation as to why that guidance went out of effect.

The GOOD Act also draws on the Trump Administration's Executive Order 13891, which directed agencies to make guidance documents publicly available.

Regulatory Accountability Act

Introduced by Senator James Lankford (Oklahoma)

Topline Summary: This legislation modernizes the Administrative Procedure Act (APA) by improving the accessibility and analytical rigor of agency rulemaking, specifically as it relates to high-impact rules and major guidance.

Statement of Purpose: Federal regulations have far-reaching consequences for the American people, yet the process governing their creation is outdated. The Regulatory Accountability Act implements several reforms to ensure that agencies justify their decisions with robust analysis, provide meaningful opportunities for public participation, and are subject to judicial review for compliance with these standards.

Overview: The Regulatory Accountability Act builds on the APA's foundation by establishing additional requirements for significant rulemaking.

- **Definition of High-Impact Rules**: The bill defines high-impact rules as those expected to have an annual economic impact of $100 million or more. Major guidance documents are similarly categorized by their potential economic or systemic effects.
- **Enhanced Cost-Benefit Analysis**: Agencies must conduct comprehensive analyses of costs, benefits, and alternatives for high-impact rules, selecting the option that maximizes net benefits.
- **Public Participation**: The bill mandates longer public comment periods (90 days for high-impact rules) and accessible dockets for all supporting materials.
- **Judicial Review**: Courts are empowered to review agency compliance with procedural and analytical requirements on a *de novo* basis but must give "due regard" to an agency as determined by its "thoroughness" in rulemaking.
- **Transparency Measures**: Agencies must publish all guidance documents and relevant data in publicly accessible, searchable formats.

The Regulatory Accountability Act represents a necessary modernization of administrative law. It aligns the regulatory process with contemporary challenges and ensures that federal agencies operate transparently in the public interest.

Take Care Act

Previously Introduced by Senator Mike Lee (Utah)

Topline Summary: This legislation, introduced in the first session of the 116th Congress by Sen. Mike Lee (R-UT), is designed to eliminate for-cause removal protections for officers ("Principal officers") appointed by the President under Article II, section 2, clause 2 of the Constitution.[26]

Statement of Purpose: To promote accountability and effective administration in the execution of laws by restoring the original understanding of the President's constitutional power to remove subordinates from office.[27]

Overview: The Take Care Act would eliminate for-cause removal protections for Principal officers, instead allowing them to be removed by the President at will. It does so by a general provision removing current for-cause removal protections.[28] This legislation also prospectively limits for-cause removal protections so no future Principal officer has for-cause removal protection unless expressly provided for in a subsequent act of Congress that declares "explicitly and with specificity that its provisions supersede" the Take Care Act.[29] This preserves the default of at-will removal while allowing for the possibility of future carve-outs when necessary. This also removes ambiguity as to Congress's intent when silent on the issue of removal: courts should not read for-cause removal protections into any statute where they are not explicitly provided.

- The Take Care Act further clarifies that acts of Congress vesting "discretionary decision-making authority in an executive branch officer other than the President, or that designate[] an agency to be an independent agency or an independent establishment" should not be construed as limitations on the President's power to "supervise and direct the exercise of such discretionary decision-making authority."[30] The bill proposes amendments to 25 statutes with for-cause removal protections, thereby removing the language providing for-cause removal protections.[31] Finally, this bill provides that statutory for-cause removal protections not amended in the previous list should also be considered no longer in effect. Thus, while a thorough list, should it prove inexhaustive, existing for-cause removal protections are considered void.
- This bill removes the current protections agency officers enjoy which insulate them from accountability and entrench them as unelected bureaucrats, untouchable by the elected Executive, in whose branch they purportedly serve. It is a crucial step in retrieving the unconstitutional authority wielded by agencies that are currently protected from the political processes of accountability intended by the Constitution.

[26] Take Care Act, S. 1753, 116th Cong. (2019).
[27] *Id.*
[28] *Id.* at § 3.
[29] *Id.* at § 4.
[30] *Id.* at § 5.
[31] *Id.* at § 6(a).

D.C. Circuit Jurisdiction Reform Act

Forthcoming from Senator Eric Schmitt (Missouri)

Topline Summary: I proposed this legislation in the first session of the 119th Congress to return jurisdiction to the proper courts of appeals for the United States. In numerous statutes, Congress has historically given unique jurisdiction to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in cases where it would otherwise not have jurisdiction.[32] This gives the D.C. Circuit disproportionate power to decide controversies and establish precedent, especially in administrative law cases. This bill corrects this disproportionate grant of power and returns jurisdiction over these cases to the proper courts of appeals.

Statement of Purpose: To limit the exclusive jurisdiction of the United States Court of Appeals for the District of Columbia Circuit, and for other purposes.

Overview: Though Congress has never articulated a defensible reason, it has repeatedly given the D.C. Circuit "special jurisdiction not only over certain substantive areas of the law, notably those areas involving 'national subjects,' such as immigration and foreign relations, but also over controversies that are more likely than others to have a 'national effect.'"[33] These cases could—and should—be heard by the court of appeals in the jurisdiction where the case or controversy arises. In many administrative law cases, the D.C. Circuit will naturally have jurisdiction by nature of geographic location. However, this is not always true. The current special treatment of the D.C. Circuit has created a disproportionate level of power and control in the D.C. Circuit.

- This bill removes that disproportionate level of power by withdrawing the special grants of jurisdiction given to the D.C. Circuit by Congress. It does so by stating the D.C. Circuit does not have jurisdiction over a "covered action"—that is, an action where a statute has granted the D.C. Circuit either exclusive jurisdiction or where a statute permits a party to seek review in the D.C. Circuit or another Court of Appeals.[34]
- The bill does not affect the D.C. Circuit's jurisdiction as provided by Chapter 83 of Title 28 of the United States Code, which establishes jurisdiction for all the Courts of Appeal for the United States. In doing so, the bill places the D.C. Circuit on equal footing with the other courts of appeal for the United States.

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[32] *See e.g.*, Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 CORNELL J. L. & PUB. POL'Y 131, 152 (2013) ("[T]he Congress has expressly given the D.C. Circuit jurisdiction over many types of administrative issues. In particular, the D.C. Circuit tends to have exclusive jurisdiction over review of rules promulgated by federal administrative agencies and, specifically, independent agencies.").

[33] *Id.* at 133.

[34] This is a frequent occurrence. *See e.g., id*. at 145 ("The Congress has authorized the D.C. Circuit to review a large number of government actions either exclusively—no other circuit can review the decision—or at the option of the plaintiff who may opt to file either in the circuit court in which the decision being reviewed took place or in the D.C. Circuit.").

Drain the Swamp Act (DRAIN Act)

Introduced by Senator Joni Ernst (Iowa)

Topline Summary: This legislation requires federal agencies to relocate a significant portion of their workforce from the Washington metropolitan area to other regions of the country.

Statement of Purpose: The Decentralizing and Reorganizing Agency Infrastructure Nationwide (DRAIN) Act seeks to increase the efficiency and accessibility of federal agencies by relocating 30% of their headquarters employees to regional offices. This measure will bring the government closer to the communities it serves.

Overview: The DRAIN Act mandates the redistribution of federal employees and office space to achieve greater geographic diversity and reduce dependency on the Washington, D.C. area. Its key provisions include:

- **Relocation of Workforce**: Requires each non-security executive agency to move 30% of its headquarters employees to offices outside the Washington metropolitan area within one year of the bill's enactment.
- **Reduction of Headquarters Space**: Directs the Office of Management and Budget (OMB) to reduce federal office space in the Washington area by at least 30%, prioritizing the sale or termination of building leases and encouraging co-location of agencies.
- **Geographic Diversity**: Ensures relocated positions are distributed across rural and urban areas, improving regional representation and in-person customer service.
- **Reporting and Accountability**: Requires agencies to submit detailed implementation plans to Congress, including the number of employees relocated and the rationale for their new duty stations.

Long Term Goals

In the Long Term, we must rethink the underlying thesis and assumption of the Administrative State and the progressive era: that only unaccountable bureaucratic elites possess the skill and expertise to create the rules of the game for a modern state. Legislative proposals that have come forward in the last several decades have been about leverage, finding ways for Congress to rein in or tame parts of the excesses of the Administrative State.

We must step through the breach created by *Loper Bright* and take a jackhammer to the Administrative State's core assumptions and thesis. We do not need more leverage, we cannot wait 30 years for the Supreme Court to undertake another "project" on the Major Questions Doctrine and Nondelegation doctrines. Our Founding Fathers gave the Article I branch the creation powers and left a very large sandbox in which we created our federal government.

We must knock down a few of these longstanding, progressive-era sandcastles, shift the paradigm, and turn the power back over to the People and their elected representatives. The health and vitality of our republic hangs in the balance. There is much that could be done, but let me start with three proposals.

First, I support enacting legislation requiring all 432 federal agencies to be reauthorized by Congress every 10 years, with a mandate to consolidate or eliminate at least 10% of redundant or ineffective agencies within 20 years, thereby reducing the size, scope, and unaccountable power of the Administrative State while enhancing democratic oversight.

Second, I believe that we should create a comprehensive system of regulatory budgeting. A high school civics class will teach most Americans that Congress's greatest power is the power of the purse. However, when it comes to executive regulations that have a multitrillion-dollar impact on our economy and federal budget,[35] we have no scheme for controlling the purse strings. If we statutorily authorize regulation, the Administrative State gets a blank check. It is time to quantify and budget our regulatory regime, reviving forgotten concepts like transparency and democracy.

Third, I support amending the U.S. Constitution. Rather than relying on the Supreme Court to conduct a generational project of re-separating three governmental powers (Legislative, Executive, and Judicial), we should create a 28th Amendment to the Constitution, inserting a Separation of Powers Clause, as inspired by the antifederalists and contained in 35 state constitutions,[36] to strengthen and revitalize the nondelegation doctrine.

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[35] *See* Dan Goldbeck, *A Trillion-Dollar Year*, AMERICAN ACTION FORUM (Apr. 29, 2024) https://www.americanactionforum.org/week-in-regulation/a-trillion-dollar-year/.

[36] *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VANDERBILT LAW REVIEW 1167, 1190 (1999) https://scholarship.law.vanderbilt.edu/vlr/vol52/iss5/7/.

Comprehensive Agency Reauthorization and Consolidation Act

Topline Summary:
Enact legislation requiring all 432 federal agencies to be reauthorized by Congress every 10 years, with a mandate to consolidate or eliminate at least 25% of redundant or ineffective agencies within 20 years, thereby reducing the size, scope, and unaccountable power of the Administrative State while enhancing democratic oversight.

Background:

The federal government's 432 agencies, averaging two new creations per year since the Constitution's ratification, form a sprawling bureaucracy that burdens Americans with $2 trillion in annual regulatory costs. Unelected officials issue rules at a pace that dwarfs Congress's legislative output, operating with impunity due to automatic funding mechanisms that bypass rigorous oversight. Many agencies prioritize their own agendas over the public interest, claiming only bureaucratic elites possess the expertise to govern a modern state. The 2024 election delivered a resounding mandate to curb this technocracy, demanding a government responsive to the People, not self-perpetuating institutions. The *Loper Bright* decision, by overturning *Chevron* deference, provides a historic opportunity to reject this elitist thesis and reclaim Congress's constitutional role as the primary lawmaker by dismantling redundant deep state agencies. Drawing on state-level models, such as Texas's and Virginia's periodic agency reviews and Congress's power of the purse, this proposal forces accountability, streamlines governance, and dismantles the Administrative State's entrenched power.

Overview:
The Comprehensive Agency Reauthorization and Consolidation Act mandates that every federal agency, from sprawling departments to obscure bureaus, obtain congressional approval every 10 years through a joint resolution. Agencies failing to secure reauthorization are terminated, with essential functions transferred to other agencies or privatized to prevent disruption. A Joint Committee on Agency Oversight, comprising House and Senate members, conducts rigorous evaluations of agencies' performance, budgets, and redundancies, recommending reauthorization, consolidation, or elimination. Agencies must submit detailed, publicly accessible reports on their statutory mandates, staffing, budgets, and rulemaking, enabling Congress and the public to assess their necessity.

Key provisions include:

- Periodic Reauthorization: Every agency faces review every 10 years, starting with the oldest, ensuring alignment with the People's will as expressed through Congress. Reviews prioritize agencies with excessive costs or minimal public benefit.
- Consolidation Mandate: Eliminate 25% of agencies by 2045, merging redundant operations (e.g., consolidating service-oriented bureaus) to streamline governance and reduce costs.

- Funding Conditions: Tie agency budgets to compliance with oversight requests, leveraging Congress's constitutional authority to enforce accountability and deter defiance.
- Transparency Requirements: Agencies publish performance metrics, cost estimates, and rulemaking impacts in plain language, accessible online, to empower public scrutiny.
- State Precedent: Modeled on Texas's 10-year agency reviews and Virginia's 25% reduction targets, which assess agencies for efficiency and eliminate those no longer justified.

The act ensures that only agencies demonstrably serving the public endure, forcing Congress to exercise its constitutional duty to steward taxpayer resources responsibly. It builds on state-level successes, where periodic reviews have eliminated outdated agencies without compromising essential services. By conditioning funding on oversight compliance, it counters bureaucratic resistance, ensuring agencies answer to Congress, not themselves. The 10-year cycle balances thorough evaluation with practicality, allowing Congress to prioritize high-impact agencies while phasing in reviews of smaller entities. This reform rejects the notion that a bloated bureaucracy is inevitable, empowering elected representatives to shape a leaner, more accountable government.

Conclusion:

The Comprehensive Agency Reauthorization and Consolidation Act delivers a generational strike against the Administrative State, dismantling its 432-agency empire and restoring lawmaking to Congress. By requiring periodic reauthorization and eliminating redundancies, it ensures that only agencies justified by the People's elected representatives persist, slashing costs and curbing unaccountable power.

Regulatory Budget Act

Topline Summary: This legislation would require significant cuts to the total existing number and cost of all federal regulations, establish PAYGO requirements, set a maximum total cost and number for federal regulations once desired cuts are achieved, and require public reporting of existing regulations and their respective costs.

Background: President Trump's Executive Order 13771, which established the first federal regulatory budget in American history, was an important step towards reducing the needless costs and requirements that federal regulations impose on Americans. However, the total number of federal regulations still increased under this budget and it was promptly rescinded by President Biden in 2021. A statutory regulatory budget would mitigate the rescission risk inherent in executive orders, ensure a significant net reduction in federal regulations moving forward, and permanently preserve that reduction once achieved.

Regulatory budget proposals were once bipartisan in nature.[37] "This may have stemmed from the fact that addressing the economic stagflation of the 1970s was a bipartisan concern, and regulations were perceived as a possible contributor to that problem."[38] We hope to be able to work across the aisle once again on creating a regulatory budgeting regime.

Overview: The Regulatory Budget Act would implement several key reforms to reduce the damage wrought by the Administrative State. First, each federal agency promulgating regulations would be required to publicly make available the number and cost of their regulations. Second, the Act would require annual reductions in regulations, both by cost imposed and by a number of regulations, for each federal agency that promulgates regulations. Third, PAYGO requirements consisting of three regulations eliminated for every new regulation created, similar to the ERASER Act, would be enforced after the duration of the annual reduction in regulations so that no net increase in regulations occurs after the reduction period. Fourth, once the reduction target is met, that target would be set as a permanent cap on both total cost and total number of regulations that would be instituted across the entire federal government.

These interlocking reforms would place the federal government on the path to permanent regulatory reform. Publicizing all regulations and associated costs would enable policymakers to identify priority regulations to repeal or modify, and easily track the overall regulatory burden over time. Annual reductions would ensure the net number of regulations no longer increases and begins decreasing, and then remains low once the cap is implemented. The PAYGO provisions

[37] *See* James Broughel, *The Regulatory Budget in Theory and Practice: Lessons from the U.S. States*, 25 HARV. J.L. & PUB. POL'Y PER CURIAM 11, 12 (2022) https://administrativestate.gmu.edu/wp-content/uploads/2022/09/Broughel_21-47.pdf.
[38] *Id.*

will additionally ensure that the cap is truly an upper limit, rather than a target ambitious bureaucrats attempt to reach through an onslaught of new regulations.

Together, these provisions overcome impediments to past efforts to rein in the Administrative State. Unlike efforts that solely focus on paring down new regulations or coupling the creation of new regulations with the repeal of existing regulations, the proposed provisions prevent any combination of new/existing regulations from ever exceeding a statutory cap on number and cost. Further, it expands beyond managing the promulgation of new regulations to placing its emphasis on the overall regulatory burden imposed by the federal government. Unlike a traditional cost-benefit analysis, it avoids the uncertainty and malleability inherent in calculating and quantifying the "benefits" of regulation and then using that figure to justify finalizing the regulation against often-substantial costs.

- Similar reforms have previously received bipartisan support. In 1980, President Jimmy Carter's Economic Report supported the concept of a regulatory budget as a method of identifying which regulations are viewed as priorities by agencies and which can be repealed.[39] Senator Mark Warner previously supported a PAYGO system that would eliminate one regulation for every new one passed.[40] Unsurprisingly, eliminating needless regulations with high costs and little actual benefit is popular and should receive strong bipartisan support.

Further, many of these reforms have been implemented at the state level and have a proven track record of success. Ohio codified a statutory cap on regulations once a previous reduction target had been achieved, and also implemented a PAYGO provision requiring state agencies to eliminate two regulations for every new regulation promulgated.[41]

- Virginia required agencies to publicize regulations and then set reduction targets of 25% for specific agencies.[42]
- Texas enacted a PAYGO requirement removing one regulation for every new one enacted.[43]

A key commonality between these reforms and other state efforts is the sole focus on regulatory costs–not a cost-benefit analysis–to avoid the inherently imprecise benefits calculation and ensure agencies must make choices on which regulations to prioritize and protect and which to either streamline or eliminate.

Conclusion: Overall, the proposed reforms permanently codify a low-regulation environment and reflect the legislative determination that minimal regulation is the ideal policy. By creating scarcity in the number and costs of regulations, the legislation forces agencies to prioritize the beneficial regulations and make better cost-benefit analyses.

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[39] *Id.*
[40] *Id.*
[41] *Id.* at 31.
[42] *Id.* at 23.
[43] *Id.* at 32.

Separation of Powers Constitutional Amendment

Topline Summary: This constitutional amendment would clarify that the Legislative, Executive, and Judicial powers granted to each respective branch of the federal government are to be exercised solely by that branch and no other by adding language to that effect to each of the three vesting clauses in Articles I, II, and III of the U.S. Constitution.

Background: Following the New Deal era, federal judicial enforcement of the separation of powers has been largely nonexistent and as a result, the current balance of powers has departed drastically from that prescribed in the Constitution and originally understood by Americans. Courts have consistently upheld sweeping grants of power to executive agencies based on vague statutory language, allowing agencies to effectively legislate as a substitute for congressional action. Even in recent years, the Supreme Court has avoided reviving a strong nondelegation doctrine that would restore the proper balance of powers necessary to protect individual rights and effectuate a republican form of government.

Overview: A separation of powers constitutional amendment, modeled after language in most state constitutions, would reverse the gradual abdication of legislative and judicial powers to the executive branch that has occurred over the past century. The Supreme Court last struck down an agency action as a violation of the separation of powers in 1935. In so doing, the Court established the test that the separation of powers (nondelegation doctrine) is violated when the statute purporting to delegate legislative power to the executive contains an "intelligible principle" an agency can follow to administer the statutory delegation.[44]

In practice, this is a standard without teeth. Not a single delegation of power from Congress to the executive has been struck down under the intelligible principle test since 1935 because almost any action can arguably be based upon an intelligible principle at some level of generality. For example, the Court upheld the EPA promulgating new air pollutant standards on the basis that the Clean Air Act has the intelligible principle of advancing "public health."[45] The result has been the seizure of Legislative power by the Executive branch, which regularly takes actions that would fail to pass Congress and then justifies those actions based upon a vague "intelligible principle" in statutes passed often a half-century or longer ago. This standard also incentivizes Congress to avoid political responsibility by delegating difficult issues to the Executive. Once the Executive acts, legislators can either take credit or cast blame for the enacted policy.

Such a vague standard has also encouraged judicial gamesmanship, leading to the distortion of statutory text. A common rule of statutory interpretation undertaken by federal judges is applying the constitutional avoidance canon. The canon dictates that when faced with conflicting interpretations of a statute where one interpretation violates the Constitution as an impermissible delegation of power and the other does not, courts should accept the latter even if is a less compelling interpretation in light of the statutory text and other interpretative tools. The Court arguably applies this canon fairly regularly to avoid striking down statutes as unconstitutional

[44] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).
[45] Whitman v. American Trucking, 531 U.S. 457, 467 (2001).

delegations even under the intelligible principle test, resulting in warped interpretations of statutes being given full effect of law.

A separation of powers constitutional amendment would solve the issues noted above of Executive abuse, the effectively limitless "intelligible principle" standard, and statutory misinterpretation under the constitutional avoidance canon. This amendment would add language to each of the respective Article I, II, and III vesting clauses specifying that the respective branches may not exercise powers granted to another branch (for example, Congress exercising Executive power) unless otherwise specified in the Constitution.

Under such language, one branch would be unable to gradually seize power from another as has occurred post-1935, and courts would be bound to enforce a stronger separation of powers between branches. The prohibition on the exercise of another branch's power would cabin the extent to which a Congress could willingly or unwillingly delegate power, as all but the most minute details would likely constitute an impermissible delegation under this new constitutional language, and the language would be inconsistent with courts applying a loose intelligible principle test to justify sweeping delegations of power.

Including this language in the Constitution is not an entirely novel idea. Although this type of amendment has never been previously proposed to the U.S. Constitution, 35 state constitutions include one version of the language proposed here. This language has been in place for many states since the Founding Era to protect a particularly robust separation of powers.

For example, Maryland's Constitution provides "that the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of the said Departments shall assume or discharge the duties of any other.[46] Likewise, Massachusetts's Constitution states "in the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end, it may be a government of laws and not of men."[47]

Amending the U.S. Constitution to include similar language would strengthen the separation of powers and provide a strong message to courts to enforce a robust nondelegation doctrine moving forward. It has been thirty-three years since the ratification of the 27th Amendment, which itself was a founding era holdover.[48] It is time to get to work on ratifying the 28th.

[46] MD. Const. art. 8.
[47] MASS. Const. art. 30.
[48] *See* Steven Calabresi and Zephyr Teachout, *The Twenty-Seventh Amendment*, NATIONAL CONSTITUTION CENTER (Accessed Jan. 12, 2025) https://constitutioncenter.org/the-constitution/amendments/amendment-xxvii/interpretations/165#the-twenty-seventh-amendment-by-steven-calabresi-and-zephyr-teachout.

Part II: The Administrative State was Unprepared for and Hostile toward *Loper Bright*

On July 11, 2024, the Post-*Chevron* Working Group sent a letter to the 101 agencies and subagencies that have, since the year 2000, published more than fifty final rules in the Federal Register that carry the force of law. Compare that to the paltry twenty-seven bills Congress sent to the President's desk for signature in 2023.[49] That means, since 2000, 101 different unelected bodies created two years' worth of laws each.

That absurd factoid aside, these agencies are well funded, employ large staffs, and exercise immense power, including the ability to greatly impact Americans' lives, for better or worse. A farmer facing new regulations with which he cannot comply might face destruction of his livelihood or even imprisonment for noncompliance.[50] With great power comes great responsibility.

How responsible have these administrative agencies been with their power, and how are they applying the watershed and long-expected *Loper Bright* decision that altered their powers? The Working Group set out to answer that question. Leading up to the *Loper Bright* decision, the Working Group asked agencies to respond to the following pertinent questions:

1. Has your agency, including its adjudicative bodies, conducted a review of ongoing adjudications that may be impacted, including on appeal, by *Loper Bright's* modification of agency rulemaking?
2. Has your agency conducted a review of ongoing civil enforcement actions that may be impacted, including on appeal, if *Chevron* is abrogated or significantly narrowed by *Loper Bright*?
3. Has your agency conducted a review of ongoing rulemaking that may be impacted if *Chevron* is abrogated or significantly narrowed by *Loper Bright*?
4. Has your agency conducted a review of recent final rules that may be impacted if *Chevron* is abrogated or significantly narrowed by *Loper Bright*?

The answers received were disheartening, to say the least. Many agencies gave flippant responses, ambiguously citing the Federal Register. Twenty agencies ignored the questions despite follow-up requests for responses and physical service of the letters.[51]

This hostility towards *Loper Bright* demonstrates the dire need for intervention. For too long, agencies have been given free reign. The American people have been assured that

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[49] Eric McDaniel, *Congress passed so few laws this year that we explained them all in 1,000 words*, NPR, Dec. 22, 2023, https://www.npr.org/2023/12/22/1220111009/congress-passed-so-few-laws-this-year-that-we-explained-them-all-in-1-000-words.

[50] See *Yates v. United States*, 574 US 528 (2015).

[51] Many of the agency responses received were answers by departments responding for numerous subagencies, which does not help inform the Working Group of the level of preparedness of the subagencies with rulemaking authority or who plays a role in the rulemaking process.

significant deference is necessary for the effective rule of law and justified by agency expertise. Rather, *Chevron* deference led to chaos, and agencies, time and time again, demonstrated that they lack the promised expertise to justify their unaccountable actions. For instance, it was recently discovered that the Snail Darter, which the EPA claimed was facing extinction, and whose listing under the Endangered Species Act famously halted the construction of a dam, never even existed.[52]

"Agency expertise" is a long-disproven fallacy. We need to restore accountability and the constitutionally mandated congressional oversight to finally reign in these runaway agencies. Below, this report discusses the Good, the Bad, and the Ugly of the eighty-one responses and opines on the twenty non-responses from those agencies "Gone Fishing." These responses are informative of the unpreparedness for and hostility toward *Loper Bright* and the need to reign in the Administrative State's exercise of power by its deep-state bureaucrat leaders.

The Good: Select Agency Preparedness for *Loper Bright*

Although most departments and agencies remain unprepared or openly defiant to *Loper Bright*, there are some exceptions. These rare few are helpful examples, not only for Congress in its reworking of laws in the aftermath of *Loper Bright* but also for other agencies as they navigate the same. They include:

- Federal Trade Commission
- Election Assistance Commission
- Federal Election Commission
- U.S. Commodity Futures Trading Commission, and
- Nuclear Regulatory Commission

Although vastly different in their operational purviews and structure, these agencies all exemplified the same readiness to *adapt* in the face of change, a rare quality in bureaucracy. Listed below are the ways they have responded to *Loper Bright* and acknowledged their ultimate subjection to congressional authority.

As the best example, the Federal Trade Commission declared it "has not relied on *Chevron* deference to support its interpretation of any of its statutory authorities, either in a rulemaking context or in an enforcement action."[53] Thus, they "did not anticipate that *Loper Bright* would affect any rules the Commission has proposed or promulgated."[54] That alone

[52] Jason Nark, *This Tiny Fish's Mistaken Identity Halted a Dam's Construction,* N.Y. TIMES, Jan. 3, 2025, https://www.nytimes.com/2025/01/03/science/snail-darter-fish-tellico-dam.html.
[53] Federal Trade Commission Response, App. 137-138.
[54] Id at 137.

embodies the spirit this I sought to affirm in preventing administrative agencies from running roughshod on the will of Congress and the American people.

Moreover, the Election Assistance Commission and Federal Election Commission provided detailed responses to each question posed by the Working Group, analyzed the source statutes for their respective commissions, and rightfully affirmed the authority of Congress to determine the extent of their rulemaking authority.

The Commodity Futures Trading Commission (CFTC) and Nuclear Regulatory Commission (NRC) both conducted a thorough review of their rulemaking process to comply with *Loper Bright*. Above all, that meant ensuring they did not exceed their congressional mandates. While this review took less effort for them (neither possess extensive rulemaking authority nor frequently enact rules) the review remains a necessary first step in ensuring a new rule reflects the agency's source statute and thus the will of the people.

Effective Measures Taken by Agencies in Response to *Loper Bright*:

1. Exclude *Chevron* deference from any rulemaking enactment or adjudication.
2. Reexamine statutes for *Loper Bright* delegations.
3. Review all rulemaking procedures and rules currently in formulation for compliance with the text of the authorizing statute.
4. Affirm congressional authority over the agency as opposed to the agenda of a Presidential Administration or the agency's mission.

In a dismal admission, those agencies that deserve lauding received it, in large part, because the stakes were lowest for them. Their duties tended to exclude rulemaking and thus, *Loper Bright* did little more than require them to double-check what was already happening. At a minimum, however, they reviewed their agency's operations and deferentially responded to our queries. That deserves commendation. Conversely, where agencies were noncompliant with Congress or facially uncaring about its demands, legislators must ask whether that attitude arises from a place of exhaustion, territorialism, or outright defiance, and respond accordingly.

The Bad: Agencies' Lack of Preparedness for *Loper Bright*

The response letters received from most agencies evince a widespread lack of preparedness for the widely predicted decision that overturned *Chevron*—both before the decision was rendered and in its immediate aftermath—and a striking indifference to its potentially expansive impact. The *Loper Bright* decision will significantly alter past and future federal rulemaking, adjudications, and civil enforcement actions, as agencies are now limited to adhering to the best reading of a statute rather than the agency's preferred interpretation. Congress has an essential role, as it alone possesses the power to rewrite statutes to conform to previous agency interpretations and determine where existing statutes should be supplemented. This framework makes the lack of preparedness and responses more concerning, as the failure to prepare, and consequently to provide the requested information, hinders Congress from fulfilling its Article I duties and effectively partnering with executive agencies.

First, the agency response letters indicate that no centralized guidance on *Loper Bright* was issued to executive agencies by the Office of Management and Budget, the White House, or any other executive branch entity. Not a single agency response indicated such guidance was received, and the response from the Office of Management and Budget simply ignored responding to this particular question—among others—in their letter to the Working Group. This failure of the Biden Administration to ensure proper preparation for and uniformity in agency deference likely contributed to the widespread agency unpreparedness. Further, the continued refusal to provide such centralized guidance shows compliance was not a priority of the Biden Administration and leaves agencies without even basic compliance guidance.

Second, no agency conducted significant preparation in anticipation of the *Loper Bright* decision despite the potential significance of the decision on their operations. The Federal Reserve System is the agency that responded most thoroughly to the question regarding anticipatory steps taken and had the most "comprehensive" action. However, this action was limited to agency "legal staff monitor[ing] the *Loper Bright* case, as staff does with all notable cases relating to administrative law."[55] It remains unclear what this monitoring precisely consisted of and whether it led to any actionable steps or assisted the agency in compliance, the answers to which were not listed in the response letter. Every other agency did not even take this limited step, either failing to respond in listing any work undertaken to prepare for *Loper Bright* or admitting that no such work was undertaken despite the widespread expectation of the case outcome and the potentially significant impact on these agencies.

For instance, the Office of the Comptroller of the Currency openly admitted that it did not prepare for the anticipated ruling in *Loper Bright*. Rather, it reframed the question, passed the buck, and stated: "The OCC did not attempt to prejudge the decision."[56] Similarly, after failing

[55] Federal Reserve System response, App. 120-127.
[56] Office of the Comptroller of the Currency response, App. 142-143.

to identify any changes in procedure, the FCC blindly assured the Working Group that it "remain[s] confident that the Commission's rules and decisions will withstand judicial review."[57] This response completely ignores the major change in law that *Loper Bright* represents. Other agencies, like AmeriCorps, offered vague and uncompelling pledges like "we will continue to follow the law."[58] This failure to take even the most basic steps to prepare for a foreseeable, significant decision is inconsistent with effective compliance and competent management.

Finally, despite the widely anticipated and potentially significant impact of *Loper Bright*, federal agencies not only failed to take basic steps to prepare for the outcome, but many appear to still operate as if the decision was never released. Agency after agency refused to detail the steps they should now take to comply with the decision. When specifically asked to delineate ongoing and recently finalized adjudications, civil enforcement actions, and rulemakings that may be affected by *Loper Bright*, almost every federal agency was either unable or unwilling to take the minimal step of listing any relevant actions or reviews taken or even considered. Several agencies, such as the Surface Transportation Board, explicitly stated *Loper Bright* would not change agency rulemaking practices, and many others implied such in their response letters.[59] NASA, for example merely stated that it would "continue its rulemaking effects as necessary" with no indication that *Loper Bright*'*s* significant changes in the law would have any impact on NASA's rulemaking.[60] Similarly, the Department of Education stated that it would "continue to implement [its] statutory directives and obligations" without noting any specific changes.[61]

Notably, the handful of federal agencies who did respond to this question were independent agencies such as the Federal Election Commission, Federal Reserve System, and Nuclear Regulatory Agency. These responses indicate widespread reluctance by federal agencies to undertake any review of past practices now inconsistent with *Loper Bright*, implement steps or reforms to ensure consistency in the future or provide the information necessary for Congress to conduct oversight to confirm compliance.

Overall, the letters sent by the federal agencies that actually responded were indicative of a widespread failure to prepare for the widely anticipated and consequential *Loper Bright* decision. No centralized guidance was issued by the Office of Management and Budget or any other federal authority. Little to no preparation was taken before the decision by the vast majority of agencies. The few that did anticipate the change took vague, minimal steps in line with less consequential cases. Until the end of the Biden Administration, agencies were unwilling to list the basic reviews they should have undertaken to ensure compliance with *Loper Bright*.

[57] Federal Communications Commission response, App. 86.
[58] AmeriCorps response, App. 91.
[59] Surface Transportation Board response, App. 78-80.
[60] NASA response, App. 96-97.
[61] Department of Education response, App. 140.

The Ugly: Hostile Agency Responses to Congressional Inquiry

Our system of governance relies on checks and balances. Congress grants authority to the executive agencies to fulfill laws with proper oversight and to publish their rules in the Federal Register. However, these agencies are still bound by the laws Congress writes and are subject to congressional oversight. Rather than properly responding to the Working Group by explaining how they would comply with *Loper Bright*, many of the agencies instead chastised the Working Group by directing it to simply reference the Federal Register for the requested information.

Twenty-seven agencies pointed the Working Group to the Federal Register:

- Department of Housing and Urban Development
- Securities and Exchange Commission
- Office of Management and Budget
- AmeriCorps
- Department of Agriculture
- Federal Aviation Administration
- Federal Transit Administration
- Occupational Safety and Health Administration
- National Aeronautics and Space Administration
- Pension Benefit Guaranty Corporation
- Department of Health and Human Services
- Department of Defense
- Department of Energy
- Drug Enforcement Administration
- Department of the Navy
- Office of the United States Trade Representative
- Environmental Protection Agency
- Department of Justice
- Department of the Treasury
- Department of Transportation
- National Credit Union Administration
- United States Forest Service
- Office of the Comptroller of the Currency
- Federal Highway Administration
- Federal Motor Carrier Safety Administration
- Federal Railroad Administration
- Social Security Administration

Simply pointing to the Federal Register where rules and regulations are published does nothing to demonstrate how those rules comply with *Loper Bright* or how they represent legally authoritative interpretations of the law. This manner of response demonstrates these agencies fail to recognize the separation of powers principles that keep our government functioning properly. *Loper Bright* held that agencies are no longer subject to *Chevron* deference, and thus agency rules and regulations must represent the best interpretation of congressionally passed laws.

By failing to substantively respond to the Working Group's request for how these agencies will adjust for the development in the law, these agencies have demonstrated they do not see themselves as subject to the oversight of Congress or take seriously their legal responsibility to operate within the bounds of the law. They view their promulgated rules as law, regardless of whether they comply with *Loper Bright* and Congress' duly-enacted statutes.

Some agencies went further out of their way to show their disdain for congressional oversight over their limited rulemaking authority. For instance, some agencies, including the Department of Energy and the Federal Communications Commission responded to the Working Group's letter by tediously recounting the procedures by which the agencies promulgate rules.[62] Rather than substantively respond to the questions of twenty senators seeking to ensure that Congress' laws are legally effectuated by the executive agencies, these agencies in particular sought to distract and deflect any responsibility. They refused to supply any helpful information on how they will comply with the law post-*Chevron*.

The Environmental Protection Agency took a similar approach. The agency provided no information on how their role would change following *Loper Bright.* Rather, it chose to gloat about its work and progress: "Thanks to the Biden-Harris Administration's historic investments in America and its ambitious climate and environmental agendas, EPA has taken significant steps in the past few years to tackle climate change, advance environmental justice, and protect the health and safety of communities across the country."[63]

The EPA did not provide any information on how it would change course. Rather it reiterated that it would continue to do what it had done in the past, despite *Loper Bright's* impact: "During the Biden-Harris Administration, EPA has been following the law and following the science, and doing so transparently. . . . EPA will continue to follow the law and the science, as rulemakings we have promulgated during this Administration have done."[64]

These responses demonstrate a clear misunderstanding or abdication of executive responsibility by failing to submit to congressional oversight and by refusing to show how their promulgated rules comply with the law as interpreted by *Loper Bright.*

[62] Federal Communications Commission response, App. 86.
[63] Environmental Protection Agency response, App. 117-119.
[64] Id, App. 117.

Non-Responses from Agencies "Gone Fishing"

Loper Bright represents a momentous shift in agency power, and its importance cannot be overstated. This case will be of enormous significance for the Trump administration, as it will be the first presidential administration entirely without *Chevron* deference since the early 1980s. Formerly, executive agencies enacted the president's will with reliance on *Chevron*, interpreting ambiguous statutes with the knowledge that federal courts would defer to their reasonable interpretations. This is a new era for executive branch agencies.

Yet, despite the magnitude of these changes in the law, many agencies could not be bothered to respond to the Working Group's questions. Twenty agencies failed to respond.

- Department of the Interior
- Department of Homeland Security
- U.S. Department of State
- Bureau of Land Management
- U.S. Fish and Wildlife Service
- United States Coast Guard
- Federal Emergency Management Agency
- National Park Service
- U.S. Citizenship and Immigration Services
- U.S. Customs and Border Protection
- International Trade Commission
- Bureau of Indian Affairs
- Office of Personnel Management
- Consumer Financial Protection Bureau
- Safety and Environmental Enforcement Bureau
- Small Business Administration
- Bureau of Ocean Energy Management
- Corporation for National and Community Service
- United States Geological Survey
- Transportation Security Administration

Additionally, many subagencies did not issue responses separate from their parent agencies. They simply trusted their parent agency's response would suffice for the inquiry. Even setting aside the deficiencies outlined above in almost all the responses we received, the failure of these subagencies to respond is an issue in and of itself.

Neither the Center for Disease Control nor the Occupational Safety and Health Administration, for example, responded and instead appealed to the letters sent by the

Department of Health and Human Services and the Department of Labor, respectively.[65] But both the CDC and OSHA enjoy vast rulemaking authority delegated by their parent agencies. During the COVID-19 pandemic, the CDC and OSHA overstepped their delegations, and the Supreme Court struck down the former's eviction moratorium and the latter's vaccine mandate.[66] Despite their willingness to issue sweeping rules to control Americans' lives, these agencies failed to respond to our inquiry about an issue of major legal importance.

If these agencies cannot take the time to respond to a congressional inquiry regarding such a consequential case, then the critics have been proven right—administrative agencies are democratically unaccountable governmental bodies of immense power. Functionally, these agencies are unaccountable to Congress, who created these agencies by statute and are charged with overseeing them, and unaccountable to the American public, whose lives they rule and regulate.

Remedy for the Crisis: Oversight

This crisis must be remedied, and Congress has ample tools at its disposal to regain control over the Administrative State. The first and strongest of Congress' tools is a more careful exercise of the power of the purse, consistent with the Constitution and much needed in the present day.

The Constitution gives the power of the purse to Congress, utilizing the Appropriations Clause[67] and Taxing and Spending Clause.[68] The funding of administrative agencies depends on congressional appropriations. In recent years, however, Congress has faced an appropriations crisis, to the benefit of administrative agencies and the detriment of the people impacted by those agencies' rules. Rather than debating and scrutinizing its budget, Congress has relied on continuing resolutions year by year to uphold the status quo. Shirking its constitutional duties, Congress has ignored concerns as to how it spends trillions of taxpayer dollars.

This congressional dependence on continuing resolutions has permitted agencies to abuse their power without consequences. Regardless of how an agency has utilized its funding in the prior fiscal year, its funding stays the same. Agencies have had no incentive to carefully stay within the bounds of their statutory authorization. This has given rise to situations like the present one, where agencies think no harm will come of failing to respond to congressional inquiries and demands.

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[65] Center for Disease Control response, App. 102-103; Occupational Safety and Health Administration response, App. 102-103.
[66] *See* Alabama Ass'n of Realtors v. HHS, 594 U.S. 758 (2021); NFIB v. OSHA, 595 U.S. 109 (2022).
[67] U.S. CONST. art. I, § 9, cl. 7
[68] U.S. CONST. art. I, § 8, cl. 1

The time has come to rein in these agencies by a rigorous and even aggressive exercise of the power of the purse. Congress may take a variety of means to achieve this end, including oversight riders. This proposal conditions funding to agencies upon agency compliance with congressional oversight requests.[69] Such a proposal is consistent with Congress's constitutional powers and would ensure that a situation such as this one will not happen again. More generally, budget reform is necessary, and the way forward calls on Congress to rise to its constitutional duty to steward taxpayer money responsibly.

Agencies will not escape scrutiny during this reform. Despite the agencies' arrogant flouting of congressional oversight, the very existence and funding of these agencies depend on Congress. After all, agencies are "creatures of statute." Congress possesses immense power to hold agencies accountable by tying funding to agency compliance with congressional demands. In a time of monumental change in agency power, the opportunity has never been better for Congress to take back the reins and restore the structure of our constitutional republic.

Congress's power to remedy this situation is not limited to its expansive power of the purse. Going forward, Congress may take other actions to hold these agencies accountable for their failure to prepare for and respond to this sea change in administrative law.

The Senate may utilize confirmation hearings to ensure the responsiveness and accountability of incoming agency officials. By conducting hearings with an eye toward the issues raised here, senators may secure commitments going forward, inquiring as to whether candidates understand the correct constitutional arrangement of the agencies vis-à-vis Congress and the scope of their rulemaking authority. In evaluating the candidates to replace agency officials who have gone rogue, the Senate may insist on confirming only those nominees who understand the responsibility of agencies to answer to Congress.

This strategy presupposes the removal of current agency officials and the appointment of new agency heads. Thus, coordination and collaboration between the executive and legislative branches is necessary. A first step may be the removal of agency officials unbothered by the need to respond to congressional inquiries, like the Working Group's, followed by a move to replace them with individuals who vow to hew more closely to congressional demands. The confirmation hearings will then verify the nominees' convictions to lead agencies within the bounds of congressional oversight.

As it stands, agency officials have shown they cannot be trusted. They have failed to comply with demands pertaining to the most consequential change in administrative law in four decades, and the Senate can ensure that new agency officials will not ignore their responsibilities, as the current officials have so flagrantly done.

[69] Kevin M. Stack & Michael P. Vandenbergh, *Oversight Riders*, 97 Notre Dame L. Rev. 127 (2021).

An Unaccountable Bureaucracy

The non-responsiveness of these agencies is part and parcel of the broader problem with the Administrative State. If these agencies, which wield so much power over the American people, cannot be bothered to respond to twenty senators, then how are they accountable and responsive to the democratic public in any meaningful sense? These agencies consist of unelected bureaucrats who do not answer to the American people or their elected representatives. The proposals described above set out ways for Congress to address the problems with this arrogant and unaccountable bureaucracy. The Constitution created a system of self-governance where those who make and execute the laws of our republic cannot escape public accountability. The modern Administrative State denies our founding's ideals. This is an occasion to right the ship and restore government by the people, for the people.

Conclusion

In conclusion, the 101 agencies and subagencies that have published fifty or more final rules since the year 2000—double the amount of bills Congress sent to the President's desk in 2023—were almost entirely unprepared for the end of *Chevron* deference. They still have no idea what it will mean for active and ongoing adjudications, civil enforcement actions, and rulemaking. More than that, it does not appear they even tried to prepare. As Supreme Court watchers across the ideological spectrum predicted for months, if not years,[70] *Chevron* deference was overruled in June 2024. Not only was the Administrative State unprepared, it has been openly hostile to discussing the changes seen coming from a mile away. This reality means a more stubbornly entrenched bureaucratic elite class of "experts" resentful that the People are back in control. It is beyond time to uproot this rot and return the lawmaking function to its proper place in our constitutional order: the People's elected branch—Congress.

[70] Eli Nachmany, *With a Cert Grant in Relentless, Inc. v. Department of Commerce, Loper Bright Gets Some Company, by Eli Nachmany*, YALE J. ON REG., Oct. 13, 2023, https://www.yalejreg.com/nc/with-a-cert-grant-in-relentless-inc-v-department-of-commerce-loper-bright-gets-some-company-by-eli-nachmany/.

Part III: The Legislative Drafter's Guide to Deference, Delegation, and Discretion.

By: Eric S. Schmitt

Every day, bill text comes across my desk that is difficult to understand. It is also difficult for courts to understand. Nevertheless, creating the law is our solemn constitutional prerogative. We must take it seriously and we must get it right. I counsel all Congressional staffers to attend legislative drafting trainings that are put on by reputable conservative organizations: i.e., Federalist Society, Heritage Foundation, and the Conservative Partnership Institute. Additionally, I recommend offices supply a copy of the Legislative Drafter's Desk Reference.

A few topics require this separate writing: **deference, delegation**, and **discretion**.

To prevent tyranny, our founders set up a system predicated on one mission – maximally defend the natural rights to which each of us is entitled by decentralizing and separating the three government powers: legislative, executive, and judicial.

Those three branches have different powers over the law: to create, execute, and interpret it. As our federal government sought to expand in scope and complexity, so too did the demands on the law creators. Rather than rising to the challenge, Article I shirked its responsibility, outsourcing law creation prerogative by delegating broad swaths of discretionary policymaking authority to the unelected, unaccountable Administrative State and our "independent" agencies. The judiciary acknowledged this acquiescence by deferring to agency interpretations of statutes.

In *Loper Bright Enterprises v. Raimondo*,[71] the Supreme Court reversed course and rejected this deference to agencies, placing the ball firmly in the hands of the Congress by reestablishing will interpret statutes as written. "If the intent of Congress is clear, that is the end of the matter."[72] This generational win requires generational change. Perhaps no change is more necessary than taking care to skillfully and precisely craft legislation. If the courts will apply what we say, then, as General Patton taught us, say what you mean and mean what you say.[73]

If bill text requires a court to acknowledge a delegation of authority to the executive, leaves a provision up to the executive's discretion, or grants deference to the executive,[74] then the courts will treat it as such. It is up to us, the members and staff of Congress, to prevent needless delegations, discretions, and deference. Hold other offices accountable, hold your colleagues accountable, and hold yourself accountable.

If we can stop the creep of the administrative leviathan, we can begin to roll it back. My hope is that this guide can play a small role in that journey. Thank you for all your hard work.

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[71] 603 U.S. 369 (2024).
[72] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984), *overruled by* Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).
[73] HOURLY HISTORY, GEORGE PATTON: A LIFE FROM BEGINNING TO END (2017).In the lead up to D-Day, he also taught us "[n]o bastard ever won a war by dying for his country. He won it by making the other poor dumb bastard die for his country." B.L. GIST, ELOQUENTLY SPEAKING 487 (2010). . While we are all from the same country, we do not seek martyrdom in a Sisyphean war against the Administrative State. We seek victory.
[74] *See* Loper, 603 U.S. 369 at 413–416 (Thomas, J., concurring)

Deference

Background:

Deference refers to a principle in administrative law where a court defers to some agency interpretation. Deference works in the following way. Imagine you find yourself in court against an administrative agency, a terrifying proposition to most Americans. When evaluating the merits of an administrative agency's interpretation, the court will, if certain criteria are met, defer to their interpretation over yours. Rather than interpreting the law providing for equal justice under the law, the courts sometimes put a thumb on the scale in favor of the Administrative State. A far cry from Chief Justice Marshall's foundational claim in *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[75]

Two categories of agency interpretation regularly receive deference: statutory interpretations and regulatory interpretations, both of which cause drafting issues.

Statutory Interpretations: Deference to agency statutory interpretations traces its roots to the growth of the Administrative State in the Progressive Era. In *Skidmore v. Swift & Co.*, the Supreme Court introduced a judicial deference framework, giving agencies deference based on the persuasiveness of its arguments. as assessed by several factors: the "thoroughness evident" in its consideration, "the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[76] Broken down, this means a court will defer to an agency ruling if it finds its argument persuasive. What does that mean in practice? Your guess is as good as mine. But one thing is certain, if we write clear enough laws, it won't often come to that point.

Following *Skidmore* was *Chevron U.S.A., Inc. v. NRDC*,[77] which created the now disgraced and overturned *Chevron* deference doctrine. This doctrine set forth a complicated multi-step test to determine when a court will put a thumb on the scale of litigation and *defer* to an agency's interpretation of a statute over your, my, or even the best reading of a statute. If a statute is "ambiguous" and an agency interpretation is "reasonable," the agency wins.

The *Chevron* deference doctrine allowed agencies to expand their power; some statutes can have many "reasonable" interpretations, including ones that go well beyond Congress's intended grant of power to an administrative agency. Since the *Chevron* case, the size and scope of the administrative scope has exploded. Gone is Congress' mandate to legislate. It is much safer politically to avoid "hard votes" by allowing agencies to implement all of your team's politically unpopular policies. The losers? Our constituents. They don't have a hotline to the EPA or the SEC, and even if they did, those agencies wouldn't pay them a lick of attention.

[75] 5 U.S. 137, 177 (1803).
[76] 323 U.S. 134, 140 (1944).
[77] Chevron, 467 U.S. at 842–843.

Regulatory Interpretations: While *Skidmore* and *Chevron* deal with deference in the context of administrative agencies' interpretations of statutes, *Auer v. Robbins*[78] and *Kisor v. Wilkie*[79] deal with deference in the context of administrative agencies' interpretations of their own ambiguous regulations.

Auer deference, and *Kisor*'s later cabining of its scope, may be worse than *Chevron* deference because it allows an agency to create an ambiguous regulation that carries the force of law, enforce that regulation against American citizens, and have a trump card in court, playing the legislative, executive, and judicial functions all at the same time.

In *Loper Bright Enterprises v. Raimondo*,[80] the Supreme Court took the bold and long overdue step of overturning the *Chevron* doctrine. But we are not sure where that leaves us. Will courts revert to applying the *Skidmore* test? Is administrative deference for statutory interpretations done and dusted? These lingering questions are why I introduced the Separation of Powers Restoration Act (SOPRA),[81] which eliminates all administrative deference standards, leveling the legal playing field between the Administrative State and the American people.

There have been legislative efforts to codify deference and reintroduce *Chevron*. For instance, the Dodd-Frank Act specifically directs federal judges to grant deference to the determinations of"[82] the CFPB, the Act's new creation, over those of other agencies. Additionally, Sen. Elizabeth Warren introduced a bill to enshrine *Chevron* deference into the Administrative Procedure Act, the inverse of SOPRA.[83]

Draft statutes precisely. Do not give in to the temptation of leaving every cost-benefit analysis up to an agency. The role of Congress is to conduct such analyses on behalf of the American people and enshrine them into law.

As Missouri's Attorney General, I regularly found myself contesting a number of the Biden Administration's ultra vires actions due to a lack of clear statutory authorization. In *Biden v. Missouri*—the HHS Vaccine Mandate case—I learned firsthand that if you give judges an easy out with ambiguous statutory language and forceful federal lawyers, they will sometimes take it.[84] But I also found, spearheading the case that turned into *Biden v. Nebraska*—the Biden student loan case—that when a statute is clear, the executive branch is less able to abuse its power and implement its agenda without consulting the People's representatives in Congress.[85]

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[78] Auer v. Robbins, 519 U.S. 452 (1997).
[79] Kisor v. Wilkie, 588 U.S. 558 (2019).
[80] Loper Bright, 603 U.S. at 412.
[81] Separation of Powers Restoration Act, S. 33, 119th Congress (2025), https://www.congress.gov/bill/119th-congress/senate-bill/33?s=1&r=5.
[82] *See e.g.,* 12 U.S.C. § 5512(b)(4)(B); Kent Barnett, *Codifying Chevmore*, 90 N.Y.U. L. Rev. 1 (2015), https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1991&context=fac_artchop
[83] Stop Corporate Capture Act, S.4749, 118th Congress (2024), https://www.congress.gov/bill/118th-congress/senate-bill/4749/text.
[84] *See* Biden v. Missouri, 595 U.S. 87 (2022).
[85] *See* Biden v. Nebraska, 600 U.S. 477 (2023) (detailing a multistate coalition effort to stop the Biden Administration's unilateral and unlawful discharge of $400,000,000,000 of student loan debt, which received standing only through the Missouri Higher Education Loan Authority or MOHELA).

Best Practices:

Democrats may eventually gain control of all three levers of elected power in Washington. When they do, they may look to codify deference in the Administrative Procedure Act; Sen. Warren has already proposed doing just that. The ivory tower of the legal academy has indoctrinated and produced most of the government lawyers in the nation's capital, ensuring that despite *Loper Bright*, sentiments to the forty-year reign of *Chevron* remain favorable. Individual Senators, Senate Leadership, Senate steering, and interested outside groups must remain aware and alert to the possibility that amendments to the APA may slip into an omnibus (or related) bill. If that happens, it is incumbent on all of us to take a stand against such a change.

In looking to best practices to avoid delegation, be precise, speak clearly, fill up the details, and make the cost-benefit analysis by assigning numeric values, dates, and trade-offs.

Do not create a new administrative agency in your bill, unless it is tasked with retiring their brothers and sisters. The United States has 432 administrative agencies. Our Constitution was passed 237 years ago. That is almost two new agencies per year, and once they are here, they are here to stay and have a core mission to stay alive. We cannot turn the tide if we are the ones causing it to rise.

Buzzwords to avoid:

Specific mentions of "deference." Deference is rarely codified in statute. The only example I have been able to find of this codification are a few sections in the Dodd-Frank Act, manipulating "the deference that a court affords."[86] If bill text you are reviewing contemplates deference by courts, run as fast as you can from the proposal.

"Arbitrary and/or Capricious." If a statute places an agency action subject to an "arbitrary and/or capricious" standard, the statute is awarding a generous standard against which agency action will be judged. Arbitrary and capricious review (or hard look review), at its core, measures if an agency action was irrational.[87] "Federal administrative agencies are required to engage in 'reasoned decisionmaking.'"[88] This standard is a reasonableness test by another name.

- Instead of allowing an agency to make reasonable determinations. Spell out in clear statutory text the determination Congress would like them to make.

Amendments to 5 U.S.C. §706 or 5 U.S.C. §553. Amendments to these sections of the Administrative Procedure Act are suspect, if not from a reliable source and specifically targeted at remedying abuses of the separation of powers. These sections govern judicial review of agency action and the procedures by which agencies may conduct rulemaking.

[86] *See* 12 U.S.C. § 5581(b)(5)(E).
[87] *See* Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
[88] Michigan v. EPA, 576 U.S. 743, 750 (2015), *quoting* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998).

Delegation

Background:

In the administrative law context, delegation refers to the congressional transfer of some power to an administrative agency, authorizing agencies to take certain actions. Without congressional delegation through statutes, agencies have no power. Congress creates agencies and empowers them to act through statutes. For this reason, agencies are "creatures of statute."

This is an important point. How you draft statutes delegating some type of power to the Administrative State will directly impact the scope of agency authority. As a drafter of bills, you hold considerable power to constrain administrative overreach. At the same time, errors in statutory delegation may have serious negative effects that would be incredibly difficult to reverse.

For decades, congressional lawmakers have not been careful about how they draft the statutes that delegate power to agencies. This was due in large part to the *Chevron* deference doctrine. This legislative drafting guide discusses deference in greater detail above. But it is worth applying insights from that section to the issue of delegation, as it should frame your understanding of congressional delegation to agencies.

Chevron was premised on the faulty notion that statutory ambiguities indicate implicit delegations of interpretive authority to administrative agencies. This led to vast delegations of immense power to agencies. Statutory ambiguities became license for agencies to take sweeping regulatory actions. The Administrative State took these delegations and ran with them. For their part, lawmakers in Congress regularly drafted and passed ambiguous statutes. Agencies were then authorized to fill in the gaps, not just regarding policy determinations but also as to legal interpretations.

Loper Bright overturned *Chevron* but still left some types of delegation intact. The two main types of remaining delegations are express delegation and policy "flexibility." With express delegations, Congress clearly empowers agencies to supply the definition for statutory terms. Courts will respect this legislative choice to place legal interpretation in the hands of the executive rather than the judicial branch.[89] Policy flexibility, meanwhile, refers to situations where Congress, by using words such as "appropriate" and "reasonable," leaves agencies with some measure of flexibility, the exercise of which courts will police by considering whether "the agency has engaged in 'reasoned decisionmaking' within [statutory] boundaries.'"[90] The sections below on best practices and buzzwords to avoid will provide you with guidance on how to navigate these two types of delegations.

Two additional relevant considerations: how agencies will interpret and act on statutory delegations, and how federal courts will adjudicate legal disputes about statutory delegations.

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[89] *See, e.g.,* Batterton v. Francis, 432 U.S. 416, 425 (1977) ("In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term…A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner").
[90] Loper Bright, 603 U.S. at 395 (2024).

First, agency interpretation. The best and safest assumption is that agencies will always try to take more power for themselves. Agencies loved *Chevron*. Statutory ambiguities meant greater power for agencies, since these ambiguities were interpreted as delegations. Do not rely on bureaucrats' good faith. The history of the Administrative State confirms one fact: agencies will invariably trend towards self-aggrandizement. Keep this front of mind as you draft statutes.

Second, how courts adjudicate disputes as to statutory delegations. You might wonder whether delegating broad lawmaking power outside of the legislative branch is unconstitutional. At one point in Supreme Court history, the Court agreed with these concerns. In two cases in 1935, the Court applied the nondelegation doctrine to strike down congressional delegations to the executive branch.[91] This doctrine holds that Congress may not delegate its legislative power to the executive branch as the Constitution vests the legislative power only in Congress.[92] Though constitutionally sound, this doctrine is all but dead. Some members of the Court have expressed a desire to revive it, but no majority supporting reconsideration of the Court's nondelegation cases currently exists.[93] The test for delegation is whether the statute has an "intelligible principle" to guide the agency,[94] and federal courts throughout the country almost always find that a delegation meets this test. As such, we must proceed on the assumption that every statutory delegation would survive a nondelegation challenge.

When deciding disputes regarding statutory delegation, federal judges will deploy the tools of statutory construction to ascertain the scope of the delegation Congress intended. To do this statutory interpretation, judges look at the text of the statute and utilize various "canons" to guide interpretation. These "canons" are established standards of interpretation that help judges in making sense of common statutory drafting conventions. These canons sometimes have intimidating Latin names but are conceptually simple. Take, for example, *ejusdem generis*. Forget the Latin and think of it as the "catch-all" canon. It stands for the idea that when a general term comes at the end of a list of specific terms, courts interpret the general word to include only items of a similar nature to the specified terms. Courts apply canons like this one to interpret statutes.

In recent years, the Court has adopted the major questions doctrine. Though the precise contours of the doctrine vary, the gist of it is relatively simple: when an agency issues a rule on a matter of "vast economic and political significance," it must base its actions on a clear statutory delegation from Congress.[95] The major questions doctrine is essentially a clear statement rule for major delegations. Of course, it is tough to predict exactly how the Supreme Court – and certainly lower courts– will apply this analysis in future cases. But it is helpful to get a sense of this background.

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[91] *See* Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570 (1935).
[92] *See* U.S. CONST. art. 1, § 1, cl. 1
[93] *See* Gundy v. United States, 588 U.S. 128, 149 (2019) (Alito, J. concurring in the judgment) (expressing a willingness to "reconsider the approach we have taken for the past 84 years" on nondelegation cases, but declining to do so because "a majority is not willing to do that").
[94] J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 410 (1928).
[95] West Virginia v. EPA*,* 597 U.S. 697, 716 (2022).

Best Practices:

Definitions: Statutes frequently contain "definitions" sections. But these have been insufficiently precise. You must now do the hard work of defining in greater detail the meaning of the terms you use. Spend time on these. Again, Congress holds the power over administrative agencies ("creatures of statute"), and the more specifically you define terms used in provisions delegating power, the more constrained agencies will be.

An example of what not to do: The Clean Water Act. This statute gives the EPA authority to oversee the "waters of the United States," without defining what this extremely vague phrase means. This has been litigated repeatedly since 1972, culminating in *Sackett v. EPA* in 2023.[96] Thankfully, the Supreme Court adopted a narrow interpretation of "waters of the United States," thus constraining the EPA's vast authority.[97] As in this case, federal judges will sometimes interpret ambiguous statutory terms in a way that constrains agency power. But sometimes they won't. If you write statutes with precision, then you limit this uncertainty.

Policy flexibility vs. precision - Compare the following two statutes:

- EPA is to regulate power plants "if the Administrator finds such regulation is appropriate and necessary."[98]
- From the Clean Air Act: "Such regulations shall require at a minimum that coke oven batteries will not exceed 8 per centum leaking doors, 1 per centum leaking lids, 5 per centum leaking offtakes, and 16 seconds visible emissions per charge, with no exclusion for emissions during the period after the closing of self-sealing oven doors."[99]

The first provision delegates broad flexibility to the EPA while the second is clear and restrictive through its technical precision. This second provision shows that Congress is perfectly capable of writing very specific statutes. Note the language of "shall" as well as the explicit exclusion of some options the agency could take.

Specificity is the name of the game. Always prioritize <u>precision</u> in drafting statutes. If you are a junior staffer, this will likely require the collaboration, insights, and expertise of more senior staff members. Do not hesitate to ask them for guidance and review. Do the hard work of engaging with the technical aspects of a legislative problem. This will undoubtedly require more work and effort than a half-hearted attempt that ambiguously delegates power. But this is necessary work and effectuates the promises of *Loper Bright* to rein in the Administrative State. *Loper Bright* does not resolve every outstanding legal question. As other sections of this drafting guide explain, it is unclear how courts will apply *Skidmore* going forward. Regardless of the fallout from *Loper Bright*, the fundamental advice remains the same. Be specific and precise in drafting statutes.

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[96] 566 U.S. 120 (2012).
[97] *Id.*
[98] 42 U.S.C. § 7412(n)(1)(A)
[99] 42 U.S.C. § 7412(d)(8)

Buzzwords to avoid:

"As defined by the Secretary" or similar language: Note the language of the following statutes, cited in *Loper Bright* as examples of express delegation of interpretive authority to an agency.

- Exemptions from the FLSA for "any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of the Secretary*)"[100]
- Requiring notification to the Nuclear Regulatory Commission when a facility regulated by the Atomic Energy Act "contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate.*"[101]

Writing a statute like this leads to the elevation of agency legal interpretation over that of federal courts. *Chevron* deference required courts to defer to agency legal interpretations when statutes were ambiguous. As explained above, *Loper Bright* reversed course with regard to statutory ambiguities. But we still risk handing interpretive authority over to agencies if we adopt language like this in statutes. You must stay on guard against unwittingly granting an express delegation of interpretive authority. You need to define the terms in the statute. Do not give this power to the agencies.

"And other measures" or similar language: Stray away from catch-all terms. As discussed above, agencies will take every opportunity to expand their authority and will treat catch-all terms, even at the end of a narrow list of options, as an opportunity to regulate. You cannot rely on federal courts to bail you out with application of *ejusdem generis* (the "catch-all" canon). Sometimes, courts apply these canons correctly, constraining agency power and striking down agency self-aggrandizement.[102] But judges may manipulate canons to reach their desired outcome, meaning that agency action premised on faulty readings of the statute may survive legal challenges. Write the statute precisely to avoid this problem.

"**Appropriate," "reasonable,"** or similar language: As discussed above, broad delegations using words like "appropriate" and "reasonable" are ripe for agency overreach. Limit usage of these terms if at all possible. These words may seem standard and non-controversial. But administrative agencies will treat them as broad delegations, leading to the issuance of more regulations, potentially of sweeping effect.

[100] 29 U.S.C. § 213(a)(15)(emphasis added)
[101] 42 U.S.C. § 5846(a)(2)(emphasis added)
[102] *See* Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758 (2021).

Discretion

Background:

Discretion, in the context of administrative law, refers to the ability of a federal agency to lawfully exercise independent choice throughout the regulatory and rulemaking process. This may take many forms, including through an agency's interpretation of a statute, choosing between a variety of policy options that were expressly or implicitly delegated to that agency, and whether to bring enforcement actions against specific organizations or individuals for various rules violations. Creatively generating discretion through lawyerly interpretations of statutes or explicitly authorizing discretion in statutory language are key engines of the worst abuses of the Administrative State. Cabining discretion with statutory language, to the maximum extent, is a necessary step a drafter must take to rein in the Administrative State.

To achieve this goal in practice, legislative drafters must understand the sources of agency discretion, how the various types of discretion interact and amplify one another, and how to avoid unintentional grants of discretion and prevent a creative agency lawyer from generating discretion through novel legal interpretations of statutory text. There are two major sources of discretion that an agency can utilize (or abuse): imprecise statutory language and explicit delegations of discretionary authority.

Imprecise Statutory Language: The specific words used in the text of a bill are perhaps the most important source of discretion for agencies and easiest for legislative drafters to control. As a general rule of thumb, drafters should aim for the highest level of precision possible to ensure the text of the statute reflects what the drafter actually wants to see in practice. The less precise the language of a bill is, the greater discretion an agency has in the rulemaking process.

Although *Loper Bright* cabined the extent to which agencies have discretion in statutory interpretation, significant discretion still remains. An agency can always choose to interpret a statute the way it sees fit and then argue in court that its interpretation is the best possible reading of a statute. It remains unclear following *Loper Bright* to what extent lower courts will give deference, if any, to these agency interpretations. Some circuit courts may be generous to agency arguments in court. However, the current Supreme Court, and most intermediate circuit courts, are dominated by judges who are committed textualists and will likely be less so.

Regardless of the judicial posture of judges on various federal courts, there are widely applicable steps drafters can take to eliminate ambiguity and imprecision in bill text. Such actions in turn limit or eliminate the various legal arguments an agency can make to justify their interpretation of a statute. The best practices subsection delineates these actions in detail, but the general rule is to be as precise as possible in the text of the drafted statute.

Most judges look to statutory definitions, dictionaries published from the time period a bill was signed into law, and the traditional tools of statutory interpretation to ascertain the meaning of a law. As a result, legislative drafters should primarily focus on the text of a statute because those words are outcome determinative to the average court.

Explicit and Implicit Delegation of Discretionary Authority: The second major source of discretion that agencies have is derived from either explicit or implicit delegations of authority to an agency. These could take the form of statutory language directing an administrator to "take all reasonable steps to…" as an example of explicit discretion that Congress has granted to an agency. Even using seemingly precise language like laying out a comprehensive firearms regulatory regime without providing a statutory definition of firearm could constitute an implicit grant of discretion, as the agency has significant leeway to define exactly what counts as a "firearm" and thus falls within your carefully crafted regulatory regime, even if what constitutes a firearm seemed obvious to you when writing and reviewing the statute.[103]

Best Practices:

Precision in text is the legislative drafter's greatest tool and the Administrative State's worst enemy. Every degree of additional precision, definition provided, or buzzword avoided takes away legal arguments an agency can utilize to exercise discretion or otherwise stretch the meaning of a statute. Below is a short checklist that adept legislative drafters can utilize to ensure agency discretion is limited to the maximum extent possible.

Definition Section: Each statute should contain a definitions section or reference definitions already codified in federal law for every key term. Drafters should ensure that all key terms are defined and that the definitions themselves are narrowly tailored.

Precise Terms: For every term in a statute that carries load-bearing weight, an adept drafter should ask whether it can be made more precise than the current level of generality. For example, a drafter may envision "new hazards" endangering "safe and healthful working conditions" as encompassing dangerous industrial chemicals, whereas an aggressive agency may interpret the lack of a COVID-19 vaccine as posing such a hazard and use that language to justify imposing a vaccine mandate on tens of millions of Americans workers.[104] In reviewing legislative text, a drafter should be able to confidently state that every major term used can be no more precise than its current iteration. If the answer to that question is no, the drafter should seek to make changes to limit agency discretion.

Think Like an Administrator: The agency charged with enforcing your statute will have a team of attorneys who may be tasked with combing through statutory text to attempt to find language somewhere, anywhere to justify an action that would otherwise be under the sole authority of Congress to take. Don't let your statute provide the basis for such actions. Once an idea is transformed into text, a drafter should take on the role of a creative agency administrator and attempt to devise ideas of how the language of a statute could be used to further ideas completely unintended by the drafters or Congress. A lack of ideas is a sign the agency may face a similar hurdle, whereas the opposite likely indicates that the statutes could be more precise.

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[103] As an example of agency overreach on a related topic, *see* Garland v. Cargill, 602 U.S. 406 (2024). There, the ATF redefined "machine gun" in the National Firearms Act of 1934 to include bump stocks. In a 6-3 decision, the Court rejected the ATF's redefinition.

[104] NFIB v. OSHA, 595 U.S. 109, 114 (2022).

Buzzwords to avoid:

The vaguer a word is, the more likely it is that drafters should avoid its use. Even under this general rule, several words and phrases throughout history have stood apart as allowing particularly egregious levels of agency discretion. These examples should be consistently avoided, to the point that it may be helpful to "control f" draft text to ensure these words stay out of future legislation. The first three are similar explanations to those in the "delegation" section.

Reasonable: Through much of the 20th century, statutes often contained provisions directing agency administrators to take "reasonable steps," "reasonable action," or promulgate rules to "reasonably address" broad problems, such as mitigating hazards in the workplace. Courts have specifically identified "reasonable" as indicating congressional approval for significant agency discretion.[105] Use of this term acts as a trigger for major agency discretion.

Appropriate: Another word previously utilized by agencies to aggressively assert rulemaking authority has been statutory language authorizing an administrator to "take appropriate action," "enact appropriate policies," or "act appropriately" to achieve a specific outcome or address a stated problem.

Necessary: Necessary functions as a close cousin of "appropriate" and both words are often used in tandem to signal significant agency discretion. Similar to reasonable and appropriate, necessary is a judicially recognized trigger word for agency discretion.

"**Arbitrary and/or capricious**:" As explained further in the "deference" section, this language is often a hidden "reasonableness" determination, granting agencies a wide latitude of discretion.

"**As defined by the secretary/administrator**:" Any statutory language expressly allowing an agency or administrator to define a key term within the bill text, or implicitly doing so by failing to provide a definition, opens the door to agency discretion. Even the famous, relatively simple example of "no vehicles allowed in the park" illustrates the centrality of definitions to key terms. Most may agree vehicle encompasses cars, but what about scooters, bikes, skateboards, or roller skates? Does a toy car count? Or perhaps a drone? Or what if a local museum wanted to display a stationary historic car in the park? Would that violate the statute? A clear definition of key terms sidesteps the ability of an agency to decide all of these questions and keeps that power within the legislative branch, where it belongs.

Conclusion

The best way to stop administrative deference, delegation, and discretion is to give agencies nothing more than ministerial duties. Hold other offices accountable, avoid the buzz words, fill up the details, and make the cost-benefit-analysis in the bill text. That is our real test.

[105] Michigan v. EPA, 576 U.S. 743, 752 (2015).

Conclusion to the Working Group Report

The Post-*Chevron* Working Group Report set out to a chart a path forward following *Loper Bright*'s momentous overruling of the *Chevron* doctrine. To that end, the Working Group Report sought answers from agencies, outside scholars, and our members. The Report has three component parts captured in this report: legislative proposals, oversight letters, and a Legislative Drafter's Guide to Discretion, Delegation, and Deference.

These three pieces analyze the necessary legislative response to and opportunity created by the *Loper Bright* decision, showcase the unprepared and hostile nature of the Administrative State to the overruling of the *Chevron* doctrine, and implore its readers to challenge the underlying thesis and assumptions of the Administrative State—that only unaccountable bureaucratic elites possess the skill and expertise to create the rules of the game for a modern state. We must charge through the breach *Loper Bright* has created and reject that thesis.

To that end, the Trump Administration has already done much to accomplish this goal. One of the Trump Administration's greatest initial successes is the critical blow it has dealt and is dealing to the size, power, and independence of the Administrative State through three powerful actions:

1. Executive Order 14192,[106] *Unleashing Prosperity Through Deregulation*.
   a. Directing agencies to eliminate 10 regulations for each new one issued.
2. Executive Order 14215,[107] *Ensuring Accountability for All Agencies*.
   a. Restricting agency independence when interpreting law and issuing regulations.
3. Presidential Memoranda titled *Directing the Repeal of Unlawful Regulations*,[108] applying Executive Order 14219,[109] *Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative*.
   a. Requiring agencies to review and repeal regulations that are unlawful under 10 watershed Supreme Court decisions, including *Loper Bright*.

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[110] James Madison, Federalist, No. 47.

I will never stop fighting for your rights, for our constitution, and to secure and protect the blessings of liberty, promised to us by our forefathers, for our posterity. Ensuring our Constitution and its Separation of Powers is between three branches of government, not four, is mission critical to that goal and to stave off tyranny.

APPENDIX #1

[106] Exec. Order No. 14192, 90 Fed. Reg. 9065 (Feb. 6, 2025).
[107] Exec. Order No. 14215, 90 Fed. Reg. 10447 (Feb. 24, 2025).
[108] *See* Presidential Memoranda, Directing the Repeal of Unlawful Regulations (Apr. 9, 2025), https://www.whitehouse.gov/presidential-actions/2025/04/directing-the-repeal-of-unlawful-regulations/.
[109] Exec. Order No. 14219, 90 Fed. Reg. 10583 (Feb. 25, 2025).
[110] THE FEDERALIST No. 47, at 139 (James Madison) (Roy Fairfield 2nd ed., 1981).

The Meetings of the Post-*Chevron* Working Group

The post-*Chevron* Working Group met on five separate occasions: two internal Working Group meetings (July 25, 2024 and October 29, 2024), two panel discussions that included a larger audience (September 18, 2024 and November 20, 2024), and one Working Group Report committee meeting (December 15, 2024).

Internal Working Group Meetings: These meetings were closed door and only for representatives of each of the 20 different member offices.

Meeting #1 – July 25, 2024: An introductory meeting with an emphasis on ideation and "kicking the tires" on the different ideas of the several member offices.[111]

Meeting #2 – October 29, 2024: An internal meeting to discuss the policy proposals being debated and plan the final two meetings of the group.

Working Group Panel Discussions: These discussions brought in outside experts to opine on important issues related to the overruling of the *Chevron* doctrine and its implications for Congress.

Panel Discussion #1 – September 18, 2024: *Beyond Deference: How can Congress reclaim its legislative prerogative?* Introductory message from Sen. Eric Schmitt. Panelists: Reed Rubenstein, Senior Vice President at America First Legal; Giancarlo Canaparo, Senior Fellow at the Heritage Foundation; Kevin Kosar, Senior Fellow at AEI; and Phillip Wallach, Senior Fellow at AEI; and Ethan Harper (Moderator), General Counsel to Sen. Eric Schmitt.

Panel Discussion #2 – November 20, 2024: *Loper Bright in the Lower Courts*. Panelists: Jennifer Mascott, Associate Professor of Law and Director of the Separation of Powers Institute at Catholic Law; Roman Martinez, Partner at Latham & Watkins; Mark Chenowith, President and Chief Legal Officer at the New Civil Liberties Alliance; Adam White, Senior Fellow at AEI, Co-director at C. Boyden Gray Center; Eli Nachmany, Associate at Covington & Burling; and Ethan Harper (Moderator), General Counsel to Sen. Eric Schmitt.

Working Group Report Committee Meeting: Planned the Working Group's final report.

Meeting #1 – December 15, 2024. A meeting discussing and organizing the *Post*-Chevron Working Group's final report.

APPENDIX #2

[111] The following materials were circulated at the first introductory meeting: "five pieces many have found helpful in getting a lay of the land in a *Loper Bright* world. Adam White, *Loper Bright and the End of Administrative Exceptionalism*; *Constitutional Government After Chevron*; Adrian Vermeule, *Chevron By Any Other Name*; Maya Kornberg *With Chevron's end, Congress urgently needs a boost in technical expertise*; Philip Wallach, *Will Congress Take the W on* Chevron? – and if you are looking for something meatier, AEI just put on a three-hour event dedicated to the "Life After Chevron: How Will Congress and Federal Agencies Adapt? The video for that event can be found here. Further, some house legislation has already been filed and Senator Cotton has filed a bill on his own—read more here."

Examples of the two oversight letters sent to agencies, Department of Homeland Security Version.

1. Letter from Eric S. Schmitt, U.S. Senator for Missouri to Department of Homeland Security, Alejandro Mayorkas, Secretary (July 11, 2024). (pp. 57-61)
2. Letter from Eric S. Schmitt, U.S. Senator for Missouri to Department of Homeland Security, Alejandro Mayorkas, Secretary (November 19, 2024). (pp. 62-64)

July 11, 2024

United States Senate
WASHINGTON, DC 20510

The Honourable Alejandro Mayorkas Secretary
Department of Homeland Security
2707 Martin Luther King Jr. Avenue SE Washington, DC 20528

Dear Secretary Mayorkas,

We write to inquire how your agency will apply the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*.[1] As you are aware, the Court recently decided *Loper Bright*, which overruled the *Chevron* doctrine, whereby courts show considerable deference to your agency's formal interpretation of ambiguous terms in the statutes your agency is tasked with administering.[2] Your agency has published **1130** of final rules since the year 2000. As your rules will be viewed with new scrutiny, we have formed the Senate's post-*Chevron* working group to investigate the impacts of *Loper Bright* and chart a path forward.

We believe that agencies should hew closely to the text of duly enacted laws, and we welcome the end of *Chevron* deference. However, some commentators have suggested that overruling *Chevron* could deprive your agency of needed flexibility.[3] Under this view, your agency must fill gaps in, or otherwise stretch the language of, laws to execute programs and meet your mission, including where it touches on public health and safety.[4] The Solicitor General, the executive branch's official representative before the Court, has associated your agency with this view.[5]

While the impact of *Loper Bright* is yet to play out in lower courts, your agency undoubtedly uses its preferred interpretation of ambiguous statutory provisions – and by extension *Chevron* deference – to justify both internal and formal legal positions, claims of authority, and actions flowing from these claims. For this reason, your agency should not ignore forecasts of *Loper Bright*'s possible far-reaching impact. Instead, your agency should take steps to understand how its programs and mission might be affected, and take steps to ensure that your agency is, in all instances, prepared to serve the American people consistent with the law.

Congress is an essential partner in these efforts. Since the *Chevron* doctrine concerns your agency's ability to assert authority beyond that expressly delegated by statute, Congress has a unique role relative to the ongoing implementation of agency programs following the Court's decision. Cooperation from your agency is key to our determination of where, if at all, statutory authorities should be supplemented to bring the plain text of the United States Code in-line with your agency's preferred interpretation. Additionally, Congress is responsible for understanding what steps your agency plans to address potentially impacted programs post-*Loper Bright*.

[1] *Loper Bright Enters. v. Raimondo*, 22-451, ___S.Ct. ____2024 WL 3208360 (2024)
[2] *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)
[3] Jagdish Sheth & Daniel Ombres, *Loper Bright and Relentless: Ending Judicial Deference to Cement Judicial Activism in the Courts*, Center for American Progress (Jan. 10, 2024), https://www.americanprogress.org/article/loper-bright-and-relentless-ending-judicial- deference-to-cement-judicial-activism-in-the-courts/.
[4] *Id.*
[5] *Loper Bright Enters. v. Raimondo*, No. 22-451, Argument Tr. at 47, line 12 (U.S. Jan. 17, 2024)

Since information sharing with Congress is essential to this partnership and to appropriately addressing any concerns your agency might have, we ask that your agency answer the following questions:

1. Did your agency, including its adjudicative bodies, conduct a review of ongoing adjudications that may be impacted, including on appeal, by the *Loper Bright* decision modification of agency rulemaking?
    a. If so, please list the adjudications you have identified which may be impacted.
    b. If a review of adjudications is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the adjudications you have identified to-date which may be impacted.
    c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?
2. Has your agency conducted a review of ongoing civil enforcement actions that may be impacted, including on appeal, if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?
    a. If so, please list the civil enforcement actions you have identified which may be impacted.
    b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently civil enforcement actions you have identified to-date which may be impacted.
    c. If not, why hasn't the agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?
3. Has the agency conducted a review of on-going[6] rulemakings that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?
    a. If so, please list the ongoing rulemakings you have identified which may be impacted.
    b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the on-going rulemakings you have identified to-date which may be impacted.
    c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?
4. Has your agency conducted a review of recently final[7] rules that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?
    a. If so, please list the recently final rules you have identified which may be impacted.
    b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently final rules you have identified to-date which may be impacted.

[6] For the purpose question 3., "on-going" includes any item that appears in either of the two (2) most recent versions of the Unified Regulatory Agenda that has yet to progress to a final rule, interim final rule, or direct final rule published in the *Federal Register*.
[7] For the purpose of question 4., "recently final" includes any final rule, interim final rule, or direct final rule published in the *Federal Register* from January 21, 2021 to the present.

    c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

We understand that your agency may have prepared for the Court's decision in Loper Bright in other ways. In this case, it's important for our oversight to identify and understand this work. For this reason, please answer the following questions:

5. Please describe any other work that your agency did to prepare for the decision in Loper Bright, including when that work commenced, its status, and key insights produced from this work.

6. If your agency hasn't done other work, please explain why. If other work is planned, please describe the nature of that work, the date it will commence and the date your agency estimates it will conclude.

7. Please describe any guidance your agency has received from the Office of Management and Budget, the White House, or any other executive branch entity related to the core issues of Loper Bright, agency deference, the separation of powers, and your agency's authority.

Providing this information in a timely fashion is essential to facilitate Congress' exercise of its constitutional authority to legislate in response to evolving judicial doctrine regarding agency implementation of those laws already on the books.

For this reason, to the extent any responsive information is potentially covered by attorney-client privilege, we request that your agency exercise its prerogative to waive the privilege. If, however, your agency declines to provide any or all responsive information due to attorney-client privilege, please specify the questions and subparts for which responsive information is being withheld under this privilege as part of a privilege log.

If responsive information is withheld under any other privilege, please include each assertion of privilege in the privilege log with similar specificity.

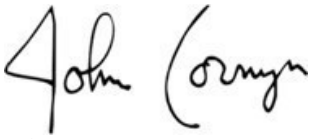
We request answers by August 2, 2024. Thank you in advance.

Sincerely,

The Post-Chevron Working Group

Eric S. Schmitt
United States Senator

Kevin Cramer
United States Senator



John Cornyn
United States Senator

Rick Scott
United States Senator

Cynthia M. Lummis
United States Senator

Joni K. Ernst
United States Senator

Ted Cruz
United States Senator

Michael S. Lee
United States Senator

Ted Budd
United States Senator

Tommy Tuberville
United States Senator

Thom Tillis
United States Senator

Pete Ricketts
United States Senator

Mike Braun
United States Senator

Roger Marshall
United States Senator

Bill Hagerty
United States Senator

Jon Thune
United States Senator

Marsha Blackburn
United States Senator

Rand Paul
United States Senator

Ron Johnson
United States Senator

United States Senate
WASHINGTON, DC 20510

November 19, 2024

The Honourable Alejandro Mayorkas
Secretary
Department of Homeland Security
2707 Martin Luther King Jr. Avenue SE
Washington, DC 20528

Dear Secretary Mayorkas,

On behalf of the Senate Post-*Chevron* Working Group, I write to follow up on our previous letter regarding the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo,* which eliminated *Chevron* deference.[1] This decision continues to have significant implications, as federal agencies must now take steps ensure that their regulations and enforcement actions are firmly grounded in the statutory text.

On July 11, 2024, the Post-*Chevron* Working Group sent your agency a letter requesting information on how it plans to address the implications of *Loper Bright*. As of today, your agency has **not responded** to the inquiry. We have reattached that letter here in case you did not receive the first letter.

Many agencies have already provided their responses, including:

- Department of Health and Human Services
- Nuclear Regulatory Commission
- Securities and Exchange Commission
- Department of Transportation
- Environmental Protection Agency
- Department of Treasury
- Department of Labor
- Department of Defense
- Department of Education
- Department of Energy
- Federal Aviation Administration
- Occupational Safety and Health Administration
- Department of Housing and Urban Development

[1] Loper Bright Enters. v. Raimondo, 22-451, _____S.Ct. ___2024 WL 3208360 (2024); Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

- Federal Transit Administration
- Department of Justice
- Federal Reserve System
- Employment and Training Administration
- Office of the Comptroller of the Currency
- Federal Highway Administration
- Federal Communications Commission
- General Services Administration
- Federal Motor Carrier Safety Administration
- Office of Management and Budget
- Federal Railroad Administration
- National Science Foundation
- National Aeronautics and Space Administration
- Federal Trade Commission
- National Highway Traffic Safety Administration
- Community Development Financial Institutions Fund
- National Credit Union Administration
- Office of Energy Efficiency and Renewable Energy
- Pipeline and Hazardous Materials Safety Administration
- Office of the United States Trade Representative
- Commodity Futures Trading Commission
- Employee Benefits Security Administration
- Surface Transportation Board
- National Archives and Records Administration
- Pension Benefit Guaranty Corporation
- Election Assistance Commission
- Workers' Compensation Programs Office
- Federal Election Commission
- Millennium Challenge Corporation
- Legal Services Corporation

Given that Congress authorizes your agency's regulatory power under Article I of the Constitution, it is vital that Congress receives your response to ensure your actions remain consistent with the law.

The Working Group request answers to the original letter by December 5, 2024 to assist Congress in our oversight responsibilities. If you have responded to the first letter and believe

this letter was sent to your agency in error, please let me know by emailing that response as a PDF. Thank you in advance.

Sincerely,

Eric S. Schmitt
United States Senator
The Post-*Chevron* Working Group, Chair

APPENDIX #3

Collected Agency Responses (Chronological Order)

1. Letter from Legal Services Corporation, Ronald S. Flagg, President to Eric S. Schmitt, U.S. Senator for Missouri (July 26, 2024). (pp. 68-72)
2. Letter from Nat'l Archives and Records Admin., Dr. Colleen J. Shogan, Archivist of the United States to Eric S. Schmitt, U.S. Senator for Missouri (July 30, 2024). (pp. 73)
3. Letter from U.S. Election Assistance Comm'n, Camden Kelliher, Acting General Counsel to Eric S. Schmitt, U.S. Senator for Missouri (July 31, 2024). (pp. 74-77)
4. Letter from Surface Transportation Board, Robert E. Primus, Chairman to Eric S. Schmitt, U.S. Senator for Missouri (August 2, 2024). (pp. 78-80)
5. Letter from Federal Election Comm'n, Sean J. Cooksey, Chairman to Eric S. Schmitt, U.S. Senator for Missouri (August 2, 2024). (pp. 81-85)
6. Letter from Federal Communications Comm'n, Jessica Rosenworcel, Chairwoman to Eric S. Schmitt, U.S. Senator for Missouri (August 2, 2024). (pp. 86)
7. Letter from Millennium Challenge Corporation, Alice P. Albright, Chief Executive Officer to Eric S. Schmitt, U.S. Senator for Missouri (August 2, 2024). (pp. 87)
8. Letter from Federal Energy Regulatory Comm'n, Willie Phillips, Chairman to Eric S. Schmitt, U.S. Senator for Missouri (August 2, 2024). (pp. 88-90)
9. Letter from AmeriCorps, Andrea Grill, Acting General Counsel to Eric S. Schmitt, U.S. Senator for Missouri (August 9, 2024). (pp. 91)
10. Letter from U.S. Dep't of Housing and Urban Development, Dr. Kimberly A. McClain, Ass'n Sec'y for Congressional and Intergovernmental Affairs to Eric S. Schmitt, U.S. Sen. for Missouri (August 12, 2024). (pp. 92)
11. Letter from U.S. Dep't of Labor, Liz Watson, Ass'n Sec'y for Congressional and Intergovernmental Affairs to Eric S. Schmitt, U.S. Senator for Missouri (August 12, 2024). (pp. 93)
12. Letter from Office of Management and Budget, Wintta Woldemariam, Assoc. Dir. For Legislative Affairs to Eric S. Schmitt, U.S. Senator for Missouri (August 13, 2024). (pp. 94-95)
13. Letter from National Aeronautics and Space Admin., Alicia Brown, Assc. Administrator for Legislative and Intergovernmental Affairs to Eric S. Schmitt, U.S. Senator for Missouri (August 13, 2024). (pp. 96-97)
14. Letter from Pension Benefit Guaranty Company, Gail Sevin, Manager for Legislative Affairs Div. to Eric S. Schmitt, U.S. Senator for Missouri (August 16, 2024). (pp. 98)
15. Letter from U.S. National Science Foundation, Sethuraman Panchanathan, Director to Eric S. Schmitt, U.S. Senator for Missouri (August 20, 2024). (pp. 99-100)

16. Letter from Dep't of Commerce, Susie Feliz, Assistant Sec'y of Commerce, Legislative and Intergovernmental Affairs to Eric S. Schmitt, U.S. Senator for Missouri (August 21, 2024). (pp. 101)

17. Letter from Dep't of Health & Human Services, Melanie Anne Egorin, PhD, Assistant Sec'y for Legislation to Eric S. Schmitt, U.S. Senator for Missouri (August 23, 2024). (pp. 102-103)

18. Letter from U.S. General Services Admin., Kusai Merchant, Acting Assc. Administrator, Office of Congressional and Intergovernmental Affairs to Eric S. Schmitt, U.S. Senator for Missouri (August 26, 2024). (pp. 104)

19. Letter from U.S. Securities and Exchange Comm'n, Gary Gensler, Chairman Eric S. Schmitt, U.S. Senator for Missouri (August 29, 2024). (pp. 105-107)

20. Letter from U.S. Commodity Futures Trading Comm'n, Rostin Behnam, Chairman to Eric S. Schmitt, U.S. Senator for Missouri (August 30, 2024). (pp. 108-111)

21. Letter from Dep't of Defense, Rheanne E. Wirkkala, Ass'n Sec'y of Defense for Legislative Affairs to Eric S. Schmitt, U.S. Senator for Missouri (September 4, 2024). (pp. 112)

22. Letter from U.S. Dep't of Energy, Alexander A. Teitz, Dept'y General Counsel for Energy Efficiency & Clean Energy Demonstrations to Eric S. Schmitt, U.S. Senator for Missouri (September 10, 2024). (pp. 113-114)

23. Letter from United States Trade Representative, Katherine Tai, Ambassador to Eric S. Schmitt, U.S. Senator for Missouri (September 20, 2024). (pp. 115-116)

24. Letter from Environmental Protection Agency, Tim Del Monico, Assoc. Administrator, Office of Congressional and Intergovernmental Relations to Eric S. Schmitt, U.S. Senator for Missouri (September 23, 2024). (pp. 117-119)

25. Letter from Board of Governors of the Federal Reserve System, Jerome H. Powell, Chairman to Eric S. Schmitt, U.S. Senator for Missouri (September 26, 2024). (pp. 120-127)

26. Letter from United States Nuclear Regulatory Commission, Christopher T. Hanson, Chairman to Eric S. Schmitt, U.S. Senator for Missouri (September 26, 2024). (pp. 128-131)

27. Letter from U.S. Dep't of Justice, Carlos Felipe Uriarte, Assistant Attorney General, Office of Legislative Affairs to Eric S. Schmitt, U.S. Senator for Missouri (September 30, 2024). (pp. 132-133)

28. Letter from U.S. Dep't of Agriculture, Thomas J. Vilsack, Sec'y to Eric S. Schmitt, U.S. Senator for Missouri (September 30, 2024). (pp. 134)

29. Letter from Dep't of the Treasury, Corey A. Tellez, Acting Assistant Sec'y, Office of Legislative Affairs to Eric S. Schmitt, U.S. Senator for Missouri (October 1, 2024). (pp. 135-136)

30. Letter from U.S. Federal Trade Comm'n, Linda M. Khan, Chairman to Eric S. Schmitt, U.S. Senator for Missouri (October 3, 2024). (pp. 137-138)

31. Letter from U.S. Dep't of Transportation, Craig Link, Principle Dep'y Assistant Sec'y for Governmental Affairs to Eric S. Schmitt, U.S. Senator for Missouri (October 1, 2024). (pp. 139)

32. Letter from U.S. Dep't of Education, Gwen Graham, Assistant Sec'y, Office of Legislation and Congressional Affairs to Eric S. Schmitt, U.S. Senator for Missouri (October 7, 2024). (pp. 140)

33. Letter from National Credit Union Admin., Samuel Schumach, Deputy Director, Office of External Affairs and Communications to Eric S. Schmitt, U.S. Senator for Missouri (October 17, 2024). (pp. 141)

34. Letter from Office of the Comptroller of the Currency, Michael J. Hsu, Acting Comptroller of the Currency to Eric S. Schmitt, U.S. Senator for Missouri (October 30, 2024). (pp. 142-143)

35. Letter from Social Security Admin., Martin O'Malley, Commissioner to Eric S. Schmitt, U.S. Senator for Missouri (November 25, 2024). (pp. 144)

36. Letter from Dep't of Veterans' Affairs, Patricia L. Ross, Assistant Sec'y for Congressional and Legislative Affairs to Eric S. Schmitt, U.S. Senator for Missouri (December 4, 2024). (pp. 145-146)

37. Letter from Federal Deposit Insurance Corporation, Martin J. Gruenberg, Chairman to Eric S. Schmitt, U.S. Senator for Missouri (December 20, 2024). (pp. 147-150)

LSC | America's Partner for Equal Justice

LEGAL SERVICES CORPORATION

July 26, 2024

The Honorable Eric Schmitt
The Post-*Chevron* Working Group
U.S. Senate
387 Russell Senate Office Building
Washington. D.C. 20510

Re: *Loper Bright* and the Legal Services Corporation

Dear Senator Schmitt and the Post-*Chevron* Working Group,

Thank you for contacting the Legal Services Corporation (LSC) regarding how we will apply the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo,* 22-451, ___ S.Ct. ___ 2024 WL 3208360 (2024) overruling the *Chevron* doctrine. Below, please find our answers to the questions you presented.

I would like to first provide some information and context about LSC. In 1974, Congress created us in the LSC Act (Act) as a D.C. nonprofit corporation that "shall not be considered a department, agency, or instrumentality[] of the Federal Government." 42 U.S.C. § 2996d(e)(1). The Act requires that we have a bipartisan, eleven-member board of directors appointed by the President and confirmed by the Senate. *Id.* at § 2996c(a). LSC manages grants for civil legal aid using funds appropriated annually by Congress. *Id.* at § 2996e(a)(1)(A). For FY 2024, we received a $560 million appropriation including $526 million for grants to our 130 recipients providing free civil legal services throughout the United States and U.S. territories. *Consolidated Appropriations Act, 2024*, Pub. L. 118-42, Div. C, Title IV (March 9, 2024).

Although we are not a federal agency, we look to the federal grant rules issued by the Office of Management and Budget for guidance and best practices. We operate our grant program based on the requirements and restrictions set by Congress.

The Act requires us to publish rules for notice and comment in the Federal Register, which are codified in the Code of Federal Regulations. *Id.* at § 2996g(e). Nonetheless, we are not an agency and not subject to the Administrative Procedure Act. *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685, 690 (D.C. Cir. 1991). Federal courts have found that Congress entrusted LSC to administer the Act in the same way as they would for an agency. Thus, for interpretations of the Act and other statutes involving LSC and our grant programs, the courts have given LSC the same deference as they would for an agency under federal law (including *Chevron*). *Id.* at 690, 696.

LSC's regulations and grants oversight hew closely to the text of the Act, LSC's appropriations riders, and other applicable laws. The bipartisan LSC Board reviews and approves all rulemaking actions from the decision to initiate rulemaking through the adoption of a final rule. LSC annually reviews our regulations and any relevant changes to law as part of developing a rulemaking agenda for Board approval. We rarely face litigation challenging our regulations, interpretations, or enforcement actions. We do not expect *Loper Bright* to alter our longstanding approach to implementing and enforcing the statutory requirements and restrictions.

3333 K Street, NW 3rd Floor
Washington, DC 20007-3522
Phone 202.295.1500 Fax 202.337.6797
www.lsc.gov

Please see below for the requested responses to the questions posed in the Working Group's July 11th letter.

1. Did your agency, including its adjudicative bodies, conduct a review of ongoing adjudications that may be impacted, including on appeal, by the *Loper Bright* decision modification of agency rulemaking?	***Yes***
LSC does not have any ongoing formal adjudications. LSC rarely conducts formal adjudications and has not had one for over twenty years. ***LSC currently has two actions that might qualify as informal adjudications: a suspension of advance payment of grant funds and a questioned cost proceeding. Neither action involves any questions of law or legal interpretation.***	
a. If so, please list the adjudications you have identified which may be impacted. ***Partial Suspension of Advance Payment of Grant Funds*** ***Service Area TN-4*** ***Suspension effective June 1 through August 29, 2024.*** ***Questioned Costs Proceeding*** ***Service Area TN-4*** ***Decision to disallow costs issued July 22, 2024.***	
b. If a review of adjudications is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the adjudications you have identified to-date which may be impacted. ***The review is not ongoing. It has been completed.***	
c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?	***N.A.***

2. Has your agency conducted a review of ongoing civil enforcement actions that may be impacted, including on appeal, if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?	***No***
a. If so, please list the civil enforcement actions you have identified which may be impacted.	***N.A.***
b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently civil enforcement actions you have identified to-date which may be impacted.	***N.A.***

c. If not, why hasn't the agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude? ***LSC does not have any ongoing civil enforcement actions involving any questions of law or legal interpretation that would be impacted by the Loper Bright decision.***	
3. Has the agency conducted a review of on-going[6] rulemakings that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?	***Yes***
a. If so, please list the ongoing rulemakings you have identified which may be impacted. ***LSC has one ongoing rulemaking. In March 2024, Congress enacted changes to the statutory requirements for grantee governing bodies. LSC is revising 45 C.F.R. Part 1607 to incorporate these changes.*** ***LSC believes that the Loper Bright decision will not impact this rulemaking because Congress made specific, technical changes to the statutory requirements that LSC is incorporating into the rule without any interpretations.***	
b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the on-going rulemakings you have identified to-date which may be impacted. ***The review is not ongoing. It has been completed. We have identified no other ongoing rulemakings that may be impacted.***	
c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?	***N.A.***
4. Has your agency conducted a review of recently final [from Jan. 21, 2021] rules that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?	***Yes***
a. If so, please list the recently final rules you have identified which may be impacted. ***45 CFR Part 1638—Restrictions on Solicitation*** ***Final Rule, 89 Fed. Reg. 25,813 (April 12, 2024)*** ***45 CFR Part 1635—Timekeeping*** ***Final Rule, 86 Fed. Reg 27,037 (May. 19, 2021)***	
b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently final rules you have identified to-date which may be impacted. ***The review is not ongoing. It has been completed. We have identified no other ongoing rulemakings that may be impacted.***	
c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?	***N.A.***
5. Please describe any other work that your agency did to prepare for the decision in Loper Bright, including when that work commenced, its status, and key insights produced from this work.	***None***

6. If your agency hasn't done other work, please explain why. If other work is planned, please describe the nature of that work, the date it will commence and the date your agency estimates it will conclude.	***LSC has not otherwise prepared for the Loper Bright decision because LSC has rarely had to rely on Chevron deference. LSC strives to promulgate and enforce regulations closely hewing to the statutory language. LSC does not currently anticipate any situations in the near future in which changes to deference law might change the outcome of an LSC action. LSC rarely faces litigation involving our regulations, interpretations, or enforcement actions. The meaning of the statutory requirements we apply are generally clear and well understood. The rulemaking process includes both written public comments and opportunities for public presentations to our Board of Directors that decides on rulemaking actions.***
7. Please describe any guidance your agency has received from the Office of Management and Budget, the White House, or any other executive branch entity related to the core issues of Loper Bright, agency deference, the separation of powers, and your agency's authority.	***None***

If LSC can be of further assistance to you and the Post-*Chevron* Working Group, please do not hesitate to contact us. LSC's government relations staff is available to answer any additional questions by reaching out to Craig Kemper at kemperc@lsc.gov or Pat Maillet at mailletp@lsc.gov.

Respectfully yours,

Ronald S. Flagg
President

NATIONAL ARCHIVES

Archivist *of the* United States

July 30, 2024

Post-Chevron Working Group
United States Senate
Washington, DC 20510

Dear Working Group Members,

Thank you for your letter of July 11, 2024 regarding the application of the Supreme Court's decision in *Loper Bright Ente1prises v. Raimondo* to the National Archives and Records Administration.

As our nation's record keeper, the National Archives is responsible for preserving, protecting and sharing the history of the United States. The federal rulemaking we conduct is directly in furtherance of our mission, and is largely focused on ensuring that

U.S. government records are properly managed by federal agencies and that historically significant records are preserved for posterity. The National Archives does not conduct adjudications or civil enforcement actions.

NARA takes its responsibilities with respect to federal rulemaking seriously, and we will review pending and existing rulemakings as necessary in light of the *Loper* decision or in the event of any legal challenges.

If you have further questions, please don't hesitate to contact John Hamilton, Director of Congressional Affairs, at (202) 357-6832.

Sincerely,

Colleen J. Shogan

DR. COLLEEN J. SHOGAN
Archivist of the United States

DR. COLLEEN SHOGAN • T: 202.357.5900 • r: 202.357.5901 • archivistoftheunitedstates@nara.gov

National Archives *and* Records Administration • 700 Pennsylvania Avenue, NW • Washington, DC 20408 • *www.archives.gov*

U.S. Election Assistance Commission
633 3rd Street NW, Suite 200
Washington, DC 20001

July 31, 2024

The Honorable Eric Schmitt
United States Senator
387 Russell Senate Office Building
Washington, DC, 20510

Dear Senator Schmitt:

Thank you for your July 11, 2024, letter to the U.S. Election Assistance Commission (EAC) Chair Ben Hovland regarding how the EAC will apply the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*[1]. I am pleased to respond on behalf of the Commission.

Under the Help America Vote Act of 2002, the EAC has limited rulemaking authority.[2] Specifically, the EAC does not, "have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government, except to the extent permitted under section 9(a) of the National Voter Registration Act of 1993."[3]

To assist in your review, you have asked the EAC to answer several questions. Each question is restated below and addressed individually.

1. Did your agency, including its adjudicative bodies, conduct a review of ongoing adjudications that may be impacted, including on appeal, by the *Loper Bright* decision modification of agency rulemaking?
    a. If so, please list the adjudications you have identified which may be impacted.
    b. If a review of adjudications is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the adjudications you have identified to-date which may be impacted.
    c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

    The EAC does not have ongoing adjudications in progress. Moreover, the EAC does not have specific adjudicatory authority. Therefore, a review of ongoing adjudications is not planned.
2. Has your agency conducted a review of ongoing civil enforcement actions that may be impacted, including on appeal, if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

[1] 603 U.S. ____(2024).
[2] Help America Vote Act of 2002," (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (2002). *See* 52 U.S.C. § 20508.
[3] *Id.*

a. If so, please list the civil enforcement actions you have identified which may be impacted.
b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently civil enforcement actions you have identified to-date which may be impacted.
c. If not, why hasn't the agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

The EAC does not have ongoing civil enforcement actions in progress that may be impacted, including on appeal, if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision. Therefore, a review of civil enforcement actions is not planned.

3. Has the agency conducted a review of on-going[4] rulemakings that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

a. If so, please list the ongoing rulemakings you have identified which may be impacted.
b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the on-going rulemakings you have identified to-date which may be impacted.
c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

The EAC has limited rulemaking authority with respect to the National Mail Voter Registration Form pursuant to the National Voter Registration Act and the Help America Vote Act. The EAC does not have any ongoing rulemakings that would be impacted by the *Loper Bright* decision at this time.

4. Has your agency conducted a review of recently final[5] rules that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

a. If so, please list the recently final rules you have identified which may be impacted.
b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently final rules you have identified to-date which may be impacted.
c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

The EAC does not have a recently final rule that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision.

[4] "For the purpose question 3., "on-going" includes any item that appears in either of the two (2) most recent versions of the Unified Regulatory Agenda that has yet to progress to a final rule, interim final rule, or direct final rule published in the Federal Register."
[5] "For the purpose of question 4., "recently final" includes any final rule, interim final rule, or direct final rule published in the Federal Register from January 21, 2021 to the present."

The EAC has limited rulemaking authority with respect to the National Mail Voter Registration Form pursuant to the National Voter Registration Act[6] and the Help America Vote Act[7]. Used to register voters for federal elections, the National Mail Voter Registration Form may only require information from applicants that is "necessary to enable the appropriate State election official to assess the eligibility of the applicant [to vote] and to administer the voter registration and other parts of the election process."[8]

We do not believe that the *Loper Bright* decision will impact the EAC's rulemaking operations under the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*[9] The Supreme Court held that states cannot require more information from applicants using the National Mail Voter Registration Form than what the EAC requires. Importantly, the Supreme Court stated that the EAC has "validly conferred discretionary executive authority" to determine what is "necessary" for applicants to provide in the Form for state election officials to assess their eligibility.[10]

Additionally, the United States Court of Appeals for the District of Columbia in *League of Women Voters of United States v. Newby*[11] found that the EAC is responsible for determining the contents of the Form, not the states. It is singularly the EAC's prerogative to determine what information from applicants is "necessary" for state election officials to evaluate voter eligibility and include only that information on the Form.

5. Please describe any other work that your agency did to prepare for the decision in *Loper Bright*, including when that work commenced, its status, and key insights produced from this work.

   The EAC did not take unique steps to prepare for the *Loper Bright* decision; please see the response to Question 6 below.

6. If your agency hasn't done other work, please explain why. If other work is planned, please describe the nature of that work, the date it will commence and the date your agency estimates it will conclude.

   The EAC has limited rulemaking authority with respect to the National Mail Voter Registration Form pursuant to the National Voter Registration Act[12] and the Help America Vote Act[13]. The EAC's rules pertaining to the National Mail Voter

[6] "National Voter Registration Act of 1993," (NVRA), Pub. L. No. 103-31, 107 Stat. 77 (1993).
[7] "Help America Vote Act of 2002," (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (2002). *See* 52 U.S.C. § 20508.
[8] 52 U.S.C. § 20508(b)(1).
[9] 570 U.S. 1 (2013).
[10] 570 U.S. at 19.
[11] 838 F.3d 1 (D.C. Cir. 2016).
[12] "National Voter Registration Act of 1993," (NVRA), Pub. L. No. 103-31, 107 Stat. 77 (1993).
[13] "Help America Vote Act of 2002," (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (2002). See specifically 52 U.S.C. § 20508.

Registration Form can be found at 11 CFR Part 9428. The *Loper Bright* decision does not impose a risk on our rules. The Supreme Court's *Inter Tribal* decision and the D.C. Circuit Court of Appeals' *Newby* decision make it clear that the EAC is the sole entity tasked with determining what should be included in the Form and that the EAC's rules will be upheld under the Administrative Procedure Act if the EAC determines that only information "necessary" to assess voter eligibility is included in the Form.

7. Please describe any guidance your agency has received from the Office of Management and Budget, the White House, or any other executive branch entity related to the core issues of *Loper Bright*, agency deference, the separation of powers, and your agency's authority.

   The EAC has not received any guidance on the *Looper Bright* decision, agency deference, the separation of powers, or agency authority.

Thank you again for your interest in the important work of the EAC. If you or your staff have any questions, please feel free to contact me at ckelliher@eac.gov or (202) 360-3160.

Sincerely,

Camden Kelliher

Camden Kelliher
Acting General Counsel
U.S. Election Assistance Commission

Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Chairman

August 2, 2024

The Honorable Eric S. Schmitt
387 Russell Senate Office Building
Washington, DC 20510

Dear Senator Schmitt:

Thank you for your interest regarding the important regulatory work of the Surface Transportation Board (STB), in light of the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

In *Loper Bright*, the Supreme Court held that courts "may not defer to an agency interpretation of the law simply because a statute is ambiguous." 144 S. Ct. at 2273. Agencies, however, retain interpretive and policymaking discretion in several important respects. For example, statutes may "empower an agency to prescribe rules to 'fill up the details' of a statutory scheme." *Id.* at 2263. Likewise, statutes can empower agencies "to regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'" 144 S. Ct. at 2263.

While the change in the law regarding agency deference may impact the way in which the agency's decisions are reviewed, I do not expect *Loper Bright* to change agency decision-making. When statutory interpretation is warranted, adjudicatory and rulemaking decisions will continue to be made based on the best reading of the statute and, when the statute confers policymaking discretion to the agency, what best accomplishes the directives that Congress has set for us.

As to your specific questions:

1. The STB has not conducted and does not plan to conduct a systematic review of ongoing adjudications that may be impacted by *Loper Bright*. Such a review is, in my judgment, unnecessary, because there is no reason to think that the agency's decision-making approach will change. We will continue to apply our best understanding of the statute and our statutorily conferred discretion, after considering the arguments presented by parties.

2. The STB does not have ongoing civil enforcement actions that may be impacted by *Loper Bright*.

3. The STB has not conducted and does not plan to conduct a systematic review of ongoing rulemakings that may be impacted by *Loper Bright*. As with adjudications, I believe such a review to be unnecessary as our decision-making approach is not expected to change. The agency's goal is to promulgate rules based on our best understanding of the statute, utilizing the reasonable exercise of policymaking discretion where the statute allows it.

4. The STB has not conducted and does not plan to conduct a systematic review of recently completed rulemakings that may be impacted by *Loper Bright*. Such a review is unnecessary both because our decision-making approach is not expected to change, and because those rules may be challenged in court within 60 days of issuance. 28 U.S.C. § 2344. In instances where the STB's rules have been challenged in court, the agency's litigation pleadings will address the implication of *Loper Bright* to the extent warranted.

5. The agency did not conduct any specific work to prepare for *Loper Bright* in advance of the Supreme Court's decision. Since the decision was issued, STB attorneys have reviewed its content to assess any applicability to pending litigation on a case-by-case basis.

6. While the STB monitored the *Loper Bright* case before the decision was issued, it was unclear what the decision would say and how it would affect the agency's work; therefore, the STB made no special preparations in advance of the Supreme Court's decision. Now that the decision has been issued, STB attorneys will continue to assess its applicability to pending litigation matters on a case-by-case basis.

7. The agency has not received any guidance from the Office of Management and Budget, the White House, or any other executive branch entity related to the core issues of *Loper Bright*, agency deference, the separation of powers, or the STB's authority.

I appreciate your interest in the STB's work, and your vigilance in identifying possible areas where statutory authority should be supplemented. If you have any questions, please contact Ms. Janie Sheng, Director of the Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245-0238.

Sincerely,

Robert E. Primus
Chairman

cc: The Honorable Kevin Cramer
The Honorable John Cornyn
The Honorable Rick Scott
The Honorable Cynthia M. Lummis
The Honorable Joni K. Ernst
The Honorable Ted Cruz
The Honorable Michael S. Lee
The Honorable Ted Budd
The Honorable Tommy Tuberville
The Honorable Thom Tillis
The Honorable Pete Ricketts
The Honorable Mike Braun
The Honorable Roger Marshall
The Honorable Bill Hagerty
The Honorable John Thune
The Honorable Marsha Blackburn
The Honorable Rand Paul
The Honorable Ron Johnson

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

August 2, 2024

The Honorable Eric S. Schmitt
Senate Post-*Chevron* Working Group
United States Senate
SR-387 Russell Senate Office Building
Washington, DC 20510-2503

Re: Response to July 11, 2024 Inquiry from Senate Post-*Chevron* Working Group

Dear Senator Schmitt:

Thank you for the letter of July 11, 2024, from the Senate's Post-*Chevron* Working Group which poses several questions to this agency. Enclosed please find this agency's response to those questions.

Should you or your staff members wish to communicate further on these or any other matters at any time, please do not hesitate to contact me at scooksey@fec.gov or (202) 694-1324, or through Duane Pugh, the Commission's Director of Congressional Affairs, at dpugh@fec.gov or (202) 694-1002.

On behalf of the Commission,

Sean J. Cooksey
Chairman

Enclosure

FEC Response to the Senate Post-*Chevron* Working Group

August 2, 2024

The Post-Chevron Working Group's letter of July 11, 2024, seeks information regarding the impact of the recent Supreme Court decision *Loper Bright Enterprises v. Raimondo*[1] on the Federal Election Commission's operations.

As an initial matter, it is important to note that the Commission has always endeavored to administer and enforce the statutes within its purview in a manner consistent with what it believes to be the best interpretation of those statutes. This remains unchanged. When confronted with an ambiguity in a statute, the Commission, as all Federal agencies, must do its best to discern the meaning of the statute. *Loper Bright* did not change this; what it changed was the degree of deference given by courts to that agency interpretation if challenged in court.

The questions posed by the Post-*Chevron* Working Group are stated below in italics, followed by the response of the Federal Election Commission.

1. *Did your agency, including its adjudicative bodies, conduct a review of ongoing adjudications that may be impacted, including on appeal, by the* Loper Bright *decision modification of agency rulemaking?*
    a. *If so, please list the adjudications you have identified which may be impacted.*
    b. *If a review of adjudications is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the adjudications you have identified to-date which may be impacted.*
    c. *If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?*

The Federal Election Commission engages in informal adjudication in two instances. First, under the Presidential Election Campaign Fund Act and the Presidential Matching Payment Account Act, the Commission adjudicates whether publicly funded presidential campaigns owe any repayments to the U.S. Treasury of any public funds that were not spent in compliance with program requirements.[2] No such actions were pending on June 28, 2024, when the *Loper Bright* decision was issued, nor have any arisen since then, so no review is necessary to date.

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1 144 S. Ct. 2244 (2024).

2 *See* 26 U.S.C. §§ 9007 & 9038.

Second, the Commission adjudicates civil penalties owed for campaign finance reports that are not filed timely in its Administrative Fine Program, with the amount of the penalties calculated in accordance with formula established by regulation. Given the nature of the violations subject to the Administrative Fine Program, very little to no statutory interpretation is involved. Therefore, these actions are not suitable for a review that considers issues stemming from the *Loper Bright* decision.

2. *Has your agency conducted a review of ongoing civil enforcement actions that may be impacted, including on appeal, if* Chevron *is abrogated or significantly narrowed by the* Loper Bright *decision?*

a. *If so, please list the civil enforcement actions you have identified which may be impacted.*

b. *If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently civil enforcement actions you have identified to-date which may be impacted.*

c. *If not, why hasn't the agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?*

The FEC has not conducted a review of ongoing civil enforcement actions to determine the effect of *Loper Bright.* Some background on the Commission's enforcement process may be helpful to clarify this response.

There are two ways an FEC enforcement matter may come before a court. First, if the Commission determines, by an affirmative vote of four of its members, that there is probable cause to believe a respondent has violated the Federal Election Campaign Act (FECA), *and* is unable to correct the violation by a conciliation agreement, the Commission may sue a respondent in U.S. District Court to enforce FECA.[3] But this is quite rare; in fiscal years 2017 through 2024 to date, the Commission closed 1,187 enforcement Matters Under Review (MURs) by conciliation agreement or dismissal and instituted three offensive enforcement lawsuits.

Second, unlike most administrative law enforcement agencies, the Commission may be sued by a complainant for dismissing a matter. This happens much more frequently than offensive enforcement lawsuits. However, Congress has provided in the statute that a Commission decision to dismiss may be overturned only if it is "contrary to law."[4] Even prior to *Chevron,* courts have traditionally treated this language as imposing by statute a deferential standard of review.[5]

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[3] FECA § 309(a)(6)(A); 52 U.S.C. § 30109(a)(6)(A).

[4] FECA § 309(a)(8); 52 U.S.C. § 30109(a)(8).

[5] *See, e.g., FEC v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 37-39 (1981).

Given these considerations, if a particular civil enforcement matter involves interpretation of an ambiguous provision in the statutes the Commission administers, the Commission may factor *Loper Bright* into its consideration of litigation risk for that matter as necessary and appropriate. In evaluating the effects of *Loper Bright*, it is also important to remember that the Court did "not call into question prior cases that relied on the *Chevron* framework." Rather, "[t]he holdings of those cases that specific agency actions are lawful . . . are still subject to statutory *stare decisis* despite our change in interpretive methodology."[6]

3. *Has the agency conducted a review of on-going[7] rulemakings that may be impacted if* Chevron *is abrogated or significantly narrowed by the* Loper Bright *decision?*

a. *If so, please list the ongoing rulemakings you have identified which may be impacted.*

b. *If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the on-going rulemakings you have identified to-date which may be impacted.*

c. *If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?*

The FEC has not reviewed on-going rulemakings for potential effects from *Loper Bright*. As previously mentioned, when confronted with ambiguity in a statute, the Commission does its best to discern the meaning of the statute when implementing regulations. It is also worth noting that the FEC is excluded from the list of agencies required to prepare regulations for the Unified Regulatory Agenda (URA), which is referenced in footnote 6 of the Working Group's letter (repeated below as footnote 7), and therefore there are no pending FEC rulemakings in the last two versions of the URA.[8]

4. *Has your agency conducted a review of recently final[9] rules that may be impacted if* Chevron *is abrogated or significantly narrowed by the* Loper Bright *decision?*

a. *If so, please list the recently final rules you have identified which may be impacted.*

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6 144 S. Ct. at 2273.

7 *For the purpose question 3., "on-going" includes any item that appears in either of the two (2) most recent versions of the Unified Regulatory Agenda that has yet to progress to a final rule, interim final rule, or direct final rule published in the* Federal Register.

8 *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993) (citing 44 U.S.C. § 3502 for the definition of agencies required to prepare regulations for the URA).

9 *For the purpose of question 4., "recently final" includes any final rule, interim final rule, or direct final rule published in the* Federal Register *from January 21, 2021 to the present.*

b. *If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently final rules you have identified to-date which may be impacted.*

c. *If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?*

The FEC has not reviewed recently finalized regulations for potential effects from *Loper Bright*. As previously mentioned, when confronted with ambiguity in a statute, the Commission does its best to discern the meaning of the statute when implementing regulations.

5. *Please describe any other work that your agency did to prepare for the decision in* Loper Bright*, including when that work commenced, its status, and key insights produced from this work.*

and

6. *If your agency hasn't done other work, please explain why. If other work is planned, please describe the nature of that work, the date it will commence and the date your agency estimates it will conclude.*

The Commission was aware of the pendency of *Loper Bright*, and its Office of General Counsel monitored developments in the case through the Supreme Court's decision. However, the Commission has limited resources and is constrained to focus its efforts primarily on doing its best to process the cases it has in hand, rather than anticipating the possible results of decisions of courts in pending cases in which it is not a party. Evaluation of the effects of *Loper Bright* on specific areas of the Commission's jurisdiction will be undertaken as described in other answers.

7. *Please describe any guidance your agency has received from the Office of Management and Budget, the White House, or any other executive branch entity related to the core issues of* Loper Bright*, agency deference, the separation of powers, and your agency's authority.*

Agency staff have not received and are not aware of any guidance from the Office of Management and Budget, the White House, or any other executive branch entity related to the *Loper Bright* decision.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF THE
CHAIRWOMAN

August 2, 2024

The Honorable Eric Schmitt
United States Senate

B11 Senate Russell Office Building
Washington, DC 20510

Dear Senator Schmitt:

Thank you for your letter on behalf of the Senate Post-Chevron Working Group regarding the rulemaking process at the Federal Communications Commission.

The Commission initiates and conducts rulemaking proceedings pursuant to authority granted to the agency by the Communications Act of 1934, as amended,[1] other relevant statutory authorities, and under the requirements of the Administrative Procedure Act.[2] The Communications Act generally assigns the Commission broad statutory authority for "the purpose of regulating all interstate and foreign communications by wire or radio and all interstate and foreign transmission of energy by radio."[3] The agency implements this statutory authority through legislative rules under the "notice and comment" provisions of the Administrative Procedure Act.[4] Through this process, the Commission the agency issues a Notice of Proposed Rulemaking and an opportunity for public comment on the proposal. Notices of Proposed Rulemaking issued by the Commission explain the need for a rule, the statutory authority for the rule, and any proposed rule changes. During this process, stakeholders may comment on the statutory basis for a rule as well as the rule changes that have been proposed.

The staff at the Commission work diligently to ensure that all regulations have a firm grounding in the law and I remain confident that the Commission's rules and decisions will withstand judicial review under the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* and other applicable precedent.

I appreciate your interest in this matter. Please let me know if I can be of further assistance.

Sincerely,

Jessica Rosenworcel

[1] 47 U.S.C. § 151 et seq.
[2] 5 U.S.C. § 500 et seq.
[3] 47 U.S.C. § 152.
[4] 5 U.S.C. § 553.

MILLENNIUM
CHALLENGE CORPORATION
UNITED STATES OF AMERICA

August 2, 2024

Post-Chevron Working Group
United States Senate
Washington, DC 20610

Dear Senators,

I am writing in response to your letter of July 11, 2024, regarding the recent United States Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

The Millennium Challenge Corporation (MCC) was created in January 2004 with strong bipartisan support and a mission to reduce poverty through economic growth. MCC partners with the world's poorest countries that are committed to just and democratic governance, economic freedom, and investing in their populations. MCC provides grants to those well-governed countries that meet MCC's stringent eligibility criteria.

Given the nature of MCC's mission and work, MCC does not engage in rulemaking on a regular basis. In its twenty years of existence, MCC has issued only five rules. These relate to certain basic operations of a U.S. government corporation, namely: MCC's basic structure and functions (72 FR 49192), complying with Freedom of Information Act requirements (73 FR 53686 and 83 FR 35544), complying with Touhy requirements (79 FR 44278), and collecting debts owed to the federal government (81 FR 59440).

MCC's mission and its grants to developing countries in support of poverty-reducing programs do not involve MCC issuing rules and regulations. MCC has no pending adjudications, no ongoing civil enforcement actions, and no ongoing rulemaking. No agency rule has recently become final. No agency rule is the subject of ongoing administrative or court adjudication.

Thank you for the opportunity to provide MCC's responses.

Sincerely,

Alice P. Albright
Chief Executive Officer

August 2, 2024

The Post-Chevron Working Group
United States Senate

Washington, D.C. 20510

Dear Senators of the Post-Chevron Working Group,

Thank you for your letter regarding these important issues. As an initial matter, I share your view that Congress should be an essential partner in reviewing and evaluating the delegations of authority made via statute to administrative agencies. As the courts have often observed, the Commission is "a creature of statute" and the authority that we administer is that which Congress has given to us. For that reason, I welcome opportunities, such as this, to engage with Congress regarding how the Commission is exercising our statutory authority on behalf of the American people.

I have provided answers to your specific questions below.

1. **Did your agency, including its adjudicative bodies, conduct a review of ongoing adjudications that may be impacted, including on appeal, by the *Loper Bright* decision modification of agency rulemaking?**

Although we are carefully considering the implications of *Loper Bright*, we have not conducted any such general review at this time. I am confident that our adjudicatory proceedings are consistent with our statutory authority, and the Commission will consider any arguments to the contrary, as appropriate, on a case-by-case basis.

2. **Has your agency conducted a review of ongoing civil enforcement actions that may be impacted, including on appeal, if Chevron is abrogated or significantly narrowed by the *Loper Bright* decision?**

As above, we have not conducted any such general review at this time regarding the implications of *Loper Bright*. I am confident that our civil enforcement proceedings are consistent with our statutory authority, and the Commission will consider any arguments to the contrary, as appropriate, on a case-by-case basis.

3. **Has the agency conducted a review of on-going rulemakings that may be impacted if Chevron is abrogated or significantly narrowed by the Loper Bright decision?**

   Here too, we have not conducted any such general review at this time regarding the implications of *Loper Bright* for on-going rulemakings. I am confident that our rulemaking proceedings are consistent with our statutory authority, and the Commission will consider any arguments to the contrary, as appropriate, on a case-by-case basis.

4. **Has your agency conducted a review of recently final7 rules that may be impacted if Chevron is abrogated or significantly narrowed by the *Loper Bright* decision?**

   Again, we have not conducted any such general review at this time regarding the implications of *Loper Bright* for recently issued rulemakings. I am confident that our rulemaking proceedings are consistent with our statutory authority, and the Commission will consider any arguments to the contrary, as appropriate, on a case-by-case basis.

5. **Please describe any other work that your agency did to prepare for the decision in *Loper Bright*, including when that work commenced, its status, and key insights produced from this work.**

   The Commission did not perform or produce any particular work product for the purposes of preparing for a decision in *Loper Bright*.

6. **If your agency hasn't done other work, please explain why. If other work is planned, please describe the nature of that work, the date it will commence and the date your agency estimates it will conclude.**

   I directed our general counsel's office to prepare a memorandum analyzing the implications for the Commission of the *Loper Bright* decision the day it was issued. I expect to receive that memorandum later this summer. That approach is consistent with our typical practice where a case to which the Commission is not a party may affect its interests and responsibilities.

7. **Please describe any guidance your agency has received from the Office of Management and Budget, the White House, or any other executive branch**

entity related to the core issues of *Loper Bright*, agency deference, the separation of powers, and your agency's authority.

We have not received such guidance.

Thank you again for your attention to these important issues. Please do not hesitate to let me know if I or my staff can be of further assistance in these matters.

Sincerely,

Willie Phillips
Chairman

AmeriCorps

August 9, 2024

The Honorable Eric Schmitt
United States Senate

387 Russell Senate Office Building
Washington, DC 20510

Dear Senator Schmitt:

Thank you for your July 11, 2024, letter to AmeriCorps Board of Directors Chairwoman Cathy McLaughlin regarding the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo,* 603 U.S. ___(2024). We appreciate your assessment of the significance of this decision in overruling *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).

AmeriCorps fully acknowledges the Senate's oversight responsibilities and authorities and respects the limits placed upon AmeriCorps' authority as an Executive Branch agency.

AmeriCorps is closely reviewing the Court's decision in *Loper Bright;* we will continue to follow the law. Any identification of pending rulemakings, adjudications, and enforcement actions that may be affected by the Court's decision in *Loper Bright* would be speculative at this juncture.

All rules AmeriCorps has issued, should you wish to review them, are available at www.federalregister.gov.

If you have any questions, please contact Tess Mason-Elder, director of government relations, at Tmason-elder@americorps.gov.

Sincerely,

Andrea Grill
Acting General Counsel
AmeriCorps

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-1000

ASSISTANT SECRETARY FOR CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

August 12, 2024

The Honorable Eric S. Schmitt
United States Senate
Washington, DC 20510

Dear Senator Schmitt:

On behalf of Acting Secretary Adrianne Todman of the Department of Housing and Urban Development (HUD), thank you for your letter dated July 11, 2024, regarding the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

HUD takes seriously its obligation to comply with the Court's decision, and we are currently evaluating the opinion and any further actions that may be necessary. To the extent your letter seeks compilations of information such as agency rules and pending agency adjudication and rulemaking actions, that information is publicly available information and equally accessible to Congress.

To the extent that any further information is needed, we are happy to engage in the accommodation process discussions to address the legitimate needs of Members.

Sincerely,

Dr. Kimberly A. McClain

Dr. Kimberly A. McClain
Assistant Secretary for Congressional
and Intergovernmental Relations

U.S. Department of Labor

Assistant Secretary for
Congressional and Intergovernmental Affairs
Washington, D.C. 20210

August 12, 2024

The Honorable Eric Schmitt
United States Senate
Washington, DC 20510

Dear Senator Schmitt:

Thank you for your July 11, 2024 correspondence on behalf of the Senate Post-*Chevron* working group to the Department and its component agencies regarding the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*. Your letter was forwarded to the Office of Congressional and Intergovernmental Affairs for a response.

The Department is committed to following the law, including binding Supreme Court precedent, as it works to serve workers, job-seekers, and retirees. The Department will continue to follow the law in promulgating regulations based on its understanding of the best meaning of the statutes it administers and enforces.

Thank you for your interest in this matter. If you have additional questions, please contact the Office of Congressional and Intergovernmental Affairs at (202) 693-4600.

Sincerely,

Liz Watson
Assistant Secretary

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

August 13, 2024

The Honorable Eric S. Schmitt
United States Senate
Washington, DC 20510

Dear Senator Schmitt:

This responds to your letter to the Office of Management and Budget (OMB) dated July 11, 2024 regarding the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*.[1] OMB appreciates the working group's interest in agency rulemakings and other initiatives.

Across various administrations, the federal government has developed rules and regulations to keep Americans safe, protect our health and environment, safeguard our financial system, and support consumers and workers. In *Loper Bright*, the Supreme Court held that courts hearing challenges to agency actions brought under the Administrative Procedure Act "may not defer to an agency interpretation of the law simply because a statute is ambiguous."[2] *Loper Bright* emphasizes, however, that the "best reading" of many statutes is that they "delegate[] discretionary authority to an agency"—for example, by authorizing agencies to "give meaning to a particular statutory term," "to prescribe rules to fill up the details of a statutory scheme," or to "regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable.'"[3] In addition, courts may "seek aid from the interpretations of those responsible for implementing particular statutes."[4]

OMB will continue to review the *Loper Bright* decision carefully and ensure that we are doing everything we can to continue to deploy the expertise of the federal workforce to keep Americans safe and ensure communities thrive and prosper.

Information concerning rulemakings and other agency activities may be found in the *Federal Register*, and information concerning current and forward-looking regulatory activities by all agencies, including OMB, may be found in the Spring 2024 Unified Agenda of Regulatory and Deregulatory Actions. OMB will comply with the law in all of its work.

[1] 144 S. Ct. 2244, 2270 (2024).
[2] *Id*. at 2273.
[3] *Id.* at 2263 (cleaned up).
[4] *Id.* at 2262.

If you have any further questions, please contact the Office of Legislative Affairs at OMBLegislativeAffairs@omb.eop.gov.

Sincerely,

Wintta Woldemariam
Associate Director for Legislative Affairs
Office of Management and Budget

National Aeronautics and Space Administration

Mary W. Jackson NASA Headquarters

Washington, DC 20546-0001

August 13, 2024

Reply to Attn of: OLIA/2024-00231:SH:leg

The Honorable Eric S. Schmitt
United States Senate
Washington, DC 20510

Dear Senator Schmitt:

Thank you for your July 11, 2024 letter regarding agency rulemaking and the possible impact of the recent decision in *Loper Bright Enterprises v. Raimondo* to such rulemaking. I appreciate your commitment to NASA's mission as we continue to explore the unknown in air and space, innovate for the benefit of humanity, and inspire the world through discovery. NASA welcomes the opportunity to provide information about NASA's rulemaking process.

NASA was established in 1958 pursuant to the National Aeronautics and Space Act, 51U.S.C. Chapter 201. Among its powers, NASA "is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of its operations and the exercise of the powers vested in it by law" 51 U.S.C. 20113(a).

Pursuant to this authority, and in accordance with the Administrative Procedure Act, 5 U.S.C. 551 *et seq.,* NASA has published regulations in Title **14** C.F.R. Chapter V. These regulations, which are available online, pertain to a variety of largely internal matters such as agency organization, 14 C.F.R. Part 1201; agency boards and committees, 5 C.F.R. Part 1209; and use of the NASA Seal, 24 C.F.R. Part 1221. Consistent with the Administrative Procedure Act, prior to publishing a regulation, NASA publishes a Notice of Proposed Rulemaking in the Federal Register to provide members of the public with an opportunity to submit their views. These comments are in turn considered by the Agency and addressed and incorporated as appropriate in the final rule. NASA continuously monitors changes in the law, whether such changes arise from legislative action or from a change in the judicial interpretation of a law.

Thank you for your letter and for your interest in this matter. NASA's regulations in Title **14** C.F.R. Chapter V significantly contribute to the Agency's ability to accomplish its missions and its compliance with the Administrative Procedure Act ensures that the public maintains a

voice in that effort. Consistent with its rulemaking authority and applicable law, NASA will continue its rulemaking effort as necessary to maintain its position as the global leader in space and aeronautics and in the study of Earth science, including climate, our Sun, solar system, and the larger universe.

Sincerely,

Alicia Brown

Associate Administrator

for Legislative and Intergovernmental Affairs

PBGC Pension Benefit Guaranty Corporation

445 12th Street SW
Washington, DC 20024-2101

202-229-4000

PBGC.gov

August 16, 2024

Dear Members of the United States Senate Post-Chevron Working Group:

Thank you for your July 11, 2024, letter requesting information about the Pension Benefit Guaranty Corporation's (PBGC) response to the recent United States Supreme Court decision in *Loper Bright Enterprises v. Raimondo*.

PBGC's regulatory agenda is posted at: PBGC Regulatory Agenda and PBGC final rules published from January 21, 2021 to the present are posted at: PBGC Final Rules.

PBGC has reviewed the Court's decision in *Loper Bright* and its implications for judicial review of agency actions. PBGC will take careful note of this decision in litigation, adjudications and in its rulemakings.

Sincerely,

Gail Sevin

Gail Sevin
Manager, Legislative Affairs Division

U.S. National Science Foundation
Office of the Director

August 20, 2024

The Honorable Eric S. Schmitt
United States Senate
Washington, D.C. 20510

Dear Senator Schmitt:

Thank you for your letter of July 11, 2024, regarding the potential impacts of *Loper Bright* on the U.S. National Science Foundation ("NSF"). NSF's mission is "to promote the progress of science; to advance the national health, prosperity, and welfare; to secure the national defense; and for other purposes." (P.L. 81-507). We fulfill our mission chiefly by making grants. Our investments account for about one-fourth of federal support to America's colleges and universities for basic research: research driven by curiosity and discovery. We also support solutions-oriented research with the potential to produce advancements for the American people.

Correspondingly, NSF is not a regulatory agency. We do not have any administrative courts or bodies, and there are no ongoing adjudications or civil enforcement actions. NSF issues a relatively small number of rules and regulations, and we regularly monitor pending Supreme Court cases to understand how our mission and programs might be affected. We take all necessary steps to ensure that NSF serves the American people consistent with the law. Accordingly, NSF will continue to consider the impact of the *Loper Bright* decision, and all relevant Supreme and Federal Court decisions, on its work.

We greatly appreciate your interest in the work of the U.S. National Science Foundation. Please feel free to contact Amanda Hallberg Greenwell, Head, Office of Legislative and Public Affairs at (703) 292-8070 if you have additional questions.

Sincerely,

Sethuraman Panchanathan
Director

Identical letter to:

The Honorable Kevin Cramer
The Honorable John Cornyn
The Honorable Rick Scott

The Honorable Cynthia M. Lummis
The Honorable Joni K. Ernst

The Honorable Ted Cruz

The Honorable Michael S. Lee
The Honorable Ted Budd

The Honorable Tommy Tuberville
The Honorable Thom Tillis

The Honorable Pete Ricketts
The Honorable Mike Braun
The Honorable Roger Marshall
The Honorable Bill Hagerty
The Honorable Jon Thune

The Honorable Marsha Blackburn
The Honorable Rand Paul

The Honorable Ron Johnson

UNITED STATES DEPARTMENT OF COMMERCE

Assistant Secretary for Legislative and Intergovernmental Affairs
Washington, D.C. 20230

August 21, 2024

The Honorable Eric S. Schmitt
United States Senate
Washington, D.C. 20510

Dear Senator Schmitt:

I write in response to the letters recently sent by you and your colleagues to Secretary Raimondo and the leaders of several Commerce Department sub-agencies regarding *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), which overruled *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). I am responding on behalf of the Department, including its bureaus.

The Department is committed to the rule of law. It seeks to faithfully execute the statutes Congress has charged it with administering, and it respects the judiciary's role in reviewing agency action. The Department also appreciates the opportunity to engage with Congress as it considers legislation, including through the provision of agency views and technical assistance on specific measures. The Department will consider, and abide by, *Loper Bright* as it fulfills these responsibilities.

Your letters requested information about agency rules, adjudications, enforcement actions, and guidance documents, both concluded and pending, that may be impacted by *Loper Bright*. Substantial information about agency action is publicly available. As noted above, the Department stands ready to provide technical assistance on specific legislation.

Thank you for your attention to this issue, and for the opportunity to share the Department's perspective. Should you have any questions, please contact me at (202) 482-3663 or sfeliz@doc.gov.

Sincerely,

Susie Feliz

Susie Feliz
Assistant Secretary of Commerce for
Legislative and Intergovernmental Affairs

DEPARTMENT OF HEALTH & HUMAN SERVICES

OFFICE OF THE SECRETARY

Assistant Secretary for Legislation
Washington, DC 20201

August 23, 2024

The Honorable Eric S. Schmitt
U.S. Senate
Washington, DC 20510

Dear Senator Schmitt:

Thank you for your July 11, 2024, letters to the Department of Health and Human Services (HHS or Department) and several of its operating divisions regarding the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244 (2024). I am pleased to respond on behalf of the Department.

HHS takes the Supreme Court's decision in *Loper Bright* seriously. The Court's decision underscores the importance of all agencies adhering to the best interpretations of the statutes Congress adopts. Following the decision, the Department remains confident in the legal underpinnings of its regulations, guidance, and decisions. We will continue to take actions that are guided by science and consistent with federal law and the Department's regulatory authorities.

The Department publishes several resources related to its guidance and rulemaking to increase transparency and ensure public participation in the process. A guide to the Department's approach to rulemaking may be found in the HHS Regulations toolkit.[1] Each fall and spring, the Department also publishes a Semiannual Regulatory Agenda, which lists all HHS regulations under development or review.[2] The Department's proposed and final rules may be found online in the Federal Register,[3] while the Department's non-rulemaking docket-which includes certain adjudications, notices, and guidance-may be found online at Regulations.gov. Likewise, the HHS Guidance Portal provides a searchable database for HHS guidance and documents currently in effect.[4]

Thank you for your interest in the Department's critical work to enhance the health and well-being of all Americans by fostering sound, sustained advances in the sciences underlying

[1] https://www.hhs.gov/regulations/regulations-toolkit/index.htm1.
[2] The Department's most recent Semiannual Regulatory Agenda is available at https://www.govinfo.gov*I*content/pkg/FR-2024-02-09/pdf/2024-00453.pdf.
[3] https://www.federalregister.gov/agencies/health-and-human-services-department.
[4] https://www.hhs.gov/guidance/

medicine, public health, and social services. If you or your staff have questions, please feel free to contact the Office of the Assistant Secretary for Legislation at (202) 690-7627.

Sincerely,

Melanie Anne Egorin

Melanie Anne Egorin, PhD
Assistant Secretary for Legislation

cc: The Honorable Kevin Cramer

The Honorable John Cornyn

The Honorable Rick Scott

The Honorable Cynthia M. Lummis

The Honorable Joni K. Ernst

The Honorable Ted Cruz

The Honorable Michael S. Lee

The Honorable Ted Budd

The Honorable Tommy Tuberville

The Honorable Thom Tillis

The Honorable Pete Ricketts

The Honorable Mike Braun

The Honorable Roger Marshall

The Honorable Bill Hagerty

The Honorable Jon Thune

The Honorable Marsha Blackburn

The Honorable Rand Paul

The Honorable Ron Johnson

Office of Congressional and Intergovernmental Affairs

August 26, 2024

The Honorable Eric S. Schmitt
United States Senate
Washington, DC 20510

Dear Senator Schmitt:

Thank you for your letter to Administrator Robin Carnahan dated July 11, 2024, regarding the impact of the United States Supreme Court's opinion in *Loper Bright Enterprises v. Raimondo*[1] on the U.S. General Services Administration (GSA). Your inquiry has been referred to me for response.

GSA takes seriously its obligation to comply with the law. We are currently evaluating the *Loper Bright* opinion and taking all appropriate steps consistent with the law.

Information regarding pending judicial challenges to GSA actions, final judicial decisions involving the agency, or completed enforcement actions by the agency can all be accessed through publicly available information systems.

Identical letters have been sent to your colleagues on the *Post-Chevron* Working Group. If you have any questions or concerns, please contact me at (202) 501-0563.

Sincerely,

DocuSigned by:
CCC0D5B6E9B1403...

Kusai Merchant

Acting Associate Administrator

[1] *603 U.S._ (2024)*

U.S. General Services Administration

1800 F Street NW
Washington, DC 20405
www.gsa.gov

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE CHAIR

August 29, 2024

The Honorable Eric Schmitt
United States Senate
387 Russell Senate Office Building
Washington, DC 20510

Dear Senator Schmitt:

Thank you for your letter regarding the potential impact of the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). I appreciate your interest in the work of the Commission.

The Supreme Court in *Loper Bright* overturned its decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984), and held that courts need not apply the deference required by *Chevron* to agency interpretations of ambiguous statutes. The Court explained, rather, that under the Administrative Procedure Act, courts should "exercise independent judgment in determining the meaning of statutory provisions." 144 S. Ct. at 2262. The Court also recognized, though, that Congress "often" confers discretionary authority on agencies to "give meaning to a particular statutory term" and may, through legislation, "empower an agency to prescribe rules to fill up the details of a statutory scheme" or "to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable.'" *Id.* at 2263 (internal quotation marks and citations omitted). In such cases, the role of a reviewing court is to "independently interpret the statute" and ensure that the agency has engaged in "reasoned decisionmaking" within its statutory bounds. *Id*.

Congress has expressly empowered the Commission to promulgate rules in support of its mission to protect investors, facilitate capital formation, and maintain fair, orderly, and efficient markets. For example, Congress has directed the Commission to promulgate rules to govern the structure of the securities markets, including registered securities exchanges. *See* 15 U.S.C. § 78k-1(a)(2) (directing the Commission to promulgate rules using "its authority under [the Exchange Act] to facilitate the establishment of a national market system for securities," "having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets" and "in accordance with the findings and to carry out the objectives set forth in [Exchange Act Section 11A(a)(1)]"). Congress also has authorized the Commission to regulate and oversee a range of entities and intermediaries that play important roles in the securities markets, such as brokers, dealers, and investment advisers. *See*, *e.g.*, *id*. § 78o(c)(3)(A) (recognizing that "the Commission shall prescribe [rules and regulations] as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility and related practices of brokers and dealers"). In addition,

Congress has authorized the Commission to establish regulations regarding the types of information certain regulated entities must disclose to investors. *See*, *e.g.*, *id*. §§ 77aa(25)-(26), 78*l*(b)(1)(J)-(L) (authorizing the Commission to adopt rules governing the disclosure of financial data through an issuer's financial statements); *see also id*. § 77s(a) (authorizing the Commission to engage in rulemaking "as may be necessary to carry out" specified statutory provisions, including by defining certain terms and prescribing how certain information is disclosed); § 78m(b)(1) (similar); § 78w(a)(1) (similar).

Throughout its history, the Commission has consistently sought to exercise its rulemaking authority in a manner consistent with the laws Congress has passed and the courts' interpretations of those laws. That remains true following the Supreme Court's decision in *Loper Bright* and the Commission will continue its commitment to exercise responsibly the authorities Congress has granted it. While we have yet to see how courts may apply *Loper Bright* in future challenges to agency action, staff has carefully reviewed the decision, and are mindful of the Supreme Court's guidance—and all other relevant legal precedent—when making recommendations to the Commission on rulemaking or any other activity.

As we work to modernize our rules for today's capital markets and technologies, the Commission will continue to pursue its important three-part mission, anchoring its actions in the authority Congress has granted it, and engaging closely with key stakeholders and the public throughout the process. All rules proposed by the Commission are published on the Commission's website and also in the *Federal Register*. Each proposal sets out the Commission's statutory authority, the Commission's policy goals, possible regulatory alternatives, and the Commission's economic analysis. The Commission then engages extensively with the public by soliciting feedback on the proposal through the notice and comment process. If the Commission votes to adopt a final rule, the Commission publishes an adopting release that again describes the statutory basis for the action, addresses and responds to the public comments, and explains the bases for the Commission's policy choices.[1]

Thank you again for your letter. Please do not hesitate to contact me at (202) 551-2100, or to have a member of your staff contact Kevin Burris, Director of the Office of Legislative and Intergovernmental Affairs, at (202) 551-2010, if we can be of further assistance.

Sincerely,

Gary Gensler
Chair

Enclosure: Carbon Copy List

[1] *See* www.sec.gov/rules-regulations/rulemaking-activity; *see also* www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=16A7FEDF778477DDD2A0227BAEFFFB71473A1CFDFF30A98A6083BFA1AC4D3F8DDD40EDCB66F85E7E676AA2C2DCCC6F494A66 (including the SEC's Spring 2024 Agenda within the Executive Branch's Unified Agenda of Regulatory and Deregulatory Actions for federal entities that outlines agencies' short- and long-term regulatory priorities).

Enclosure: Carbon Copy List

The Honorable Marsha Blackburn
United States Senate

The Honorable Mike Braun
United States Senate

The Honorable Ted Budd
United States Senate

The Honorable John Cornyn
United States Senate

The Honorable Kevin Cramer
United States Senate

The Honorable Ted Cruz
United States Senate

The Honorable Joni Ernst
United States Senate

The Honorable Bill Hagerty
United States Senate

The Honorable Ron Johnson
United States Senate

The Honorable Mike Lee
United States Senate

The Honorable Cynthia M. Lummis
United States Senate

The Honorable Roger Marshall
United States Senate

The Honorable Rand Paul
United States Senate

The Honorable Pete Ricketts
United States Senate

The Honorable Rick Scott
United States Senate

The Honorable John Thune
United States Senate

The Honorable Thom Tillis
United States Senate

The Honorable Tommy Tuberville
United States Senate

U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre

1155 21st Street, NW, Washington, DC 20581

www.cftc.gov

Rostin Behnam
Chairman

(202) 418-5030

Chairman@CFTC.gov

August 30, 2024

Dear Senators of the Post-*Chevron* Working Group,

Thank you for your letter of July 11, 2024, requesting information about how the agency will apply the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, which overruled the *Chevron* doctrine. We appreciate the outreach and understand and respect your interest. Please see below for responses to your questions.

Did your agency, including its adjudicative bodies, conduct a review of ongoing adjudications that may be impacted, including on appeal, by the *Loper Bright* decision modification of agency rulemaking?

Unlike many other statutes, the Commodity Exchange Act ("CEA"), 7U.S.C. §§ 1 *et seq.*, establishes a principles-based regulatory framework, which includes a number of explicit delegations to the agency to implement aspects of the statute in a reasonable manner. Deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), was premised on *implicit* delegations of authority in ambiguous text, and it has therefore not played a major role in the CFTC's activities.

Has your agency conducted a review of ongoing civil enforcement actions that may be impacted, including on appeal, if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

In some legal briefs filed before the Supreme Court reversed *Chevron* in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, _ U.S. _ (2024), the CFTC did cite *Chevron*. However, the CFTC's practice has not been to rely solely on *Chevron*. Instead, in cases involving statutory interpretation, the CFTC has argued that its proposed interpretation is correct based on the statutory language, and should be adopted by the court. Then, as an alternate ground, the Commission has argued that even if the statute were ambiguous, the Commission's interpretation is reasonable and should be followed under *Chevron*. Of course, the Commission will no longer be making that argument.

Has the agency conducted a review of on-going rulemakings that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

The agency has also conducted a review of on-going rulemakings and final rulemakings that may CFTC's practice is to interpret the CEA according to its plain meaning and using traditional tools

of statutory construction, to apply the law as written. During the last four years, the agency has not relied upon or cited *Chevron* in any rulemakings. The CFTC therefore does not anticipate altering its approach to statutory interpretation going forward.

Please describe any other work that your agency did to prepare for the decision in *Loper Bright*, including when that work commenced, its status, and key insights produced from this work.

The work the agency has done in anticipation or since the Supreme Court decision on *Loper Bright* is reflected in this letter.

If your agency hasn't done other work, please explain why. If other work is planned, please describe the nature of that work, the date it will commence and the date your agency estimates it will conclude.

For the reasons given above, the CFTC is minimally impacted by *Loper Bright.*

Please describe any guidance your agency has received from the Office of Management and Budget, the White House, or any other executive branch entity related to the core issues of *Loper Bright*, agency deference, the separation of powers, and your agency's authority.

The CFTC is an independent agency. Accordingly, it relies on its Office of the General Counsel for issues related to *Loper Bright*.

If you have additional questions or concerns, please reach out to Ann Wright, Director, Office of Legislative and Intergovernmental Affairs at awright@cftc.gov.

Sincerely,

CC:

The Honorable Eric S. Schmitt
U.S. Senator

The Honorable Kevin Cramer
U.S. Senator

The Honorable John Cornyn
U.S. Senator

The Honorable Rick Scott
U.S. Senator

The Honorable Cynthia M. Lummis
U.S. Senator

The Honorable Joni K. Ernst
U.S. Senator

The Honorable Ted Cruz
U.S. Senator

The Honorable Michael S. Lee
U.S. Senator

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The Honorable Roger Marshall
U.S. Senator

The Honorable Bill Hagerty
U.S. Senator

The Honorable Jon Thune
U.S. Senator

The Honorable Marsha Blackburn
U.S. Senator

The Honorable Rand Paul
U.S. Senator

The Honorable Ron Johnson
U.S. Senator

THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, DC 20301-1300

LEGISLATIVE
AFFAIRS

The Honorable Eric S. Schmitt
United States Senate
Washington, DC 20510

SEP 4 2024

Dear Senator Schmitt:

Thank you for your letters of July 11, 2024, to Secretary of Defense Lloyd J. Austin III, Secretary of the Navy Carlos Del Toro, and Secretary of the Army Christine Wormuth, regarding the U.S. Supreme Court's decision in *Loper Bright Enterprises, et al. v. Gina Raimondo, Secretary of Commerce, et al.* I am responding on the group's behalf.

In *Loper Bright,* the Supreme Court held that courts hearing challenges to agency actions brought under the Administrative Procedure Act "may not defer to an agency interpretation of the law simply because a statute is ambiguous" and "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Loper Bright,* 603 U.S. at *35.

Information concerning rulemakings and other agency activities of the Department of Defense may be found in the *Federal Register,* and information concerning current and forward-looking regulatory activities by all agencies may be found in the Spring 2024 Unified Agenda of Regulatory and Deregulatory Actions. The Department will continue to ensure that the Department's actions, taken in furtherance of its vital mission to defend the nation, comply with the law.

Thank you for your continued support for all who serve in the Department of Defense. I am sending an identical response to the other signatories of your letters.

Sincerely,

Rheanne E. Wirkkala

Department of Energy

Washington, DC 20585

September 10, 2024

The Honorable Eric S. Schmitt
United States Senate
Washington, DC 20510

Dear Senator Schmitt:

Thank you for your July 11, 2024, letter regarding the Supreme Court's June 28, 2024 decision in *Loper Bright Enterprises v. Raimondo*.[1] I am responding on Secretary Granholm's behalf.

As you note in your letter, in *Loper Bright*, the Supreme Court overruled the deference framework in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*.[2] The Department of Energy (DOE) is taking and will take all necessary steps to ensure its actions are and remain consistent with the law, including this decision.

DOE's proposed and final rules are publicly available in the *Federal Register* and on the Unified Agenda of Regulatory and Deregulatory Actions published by the Regulatory Information Service Center in coordination with Office of Information and Regulatory Affairs (OIRA).[3] In addition, in accordance with the Congressional Review Act,[4] prior to a final rule taking effect, DOE submits a report to each house of Congress and the Comptroller General containing a copy of the rule; a concise general statement describing the rule, including whether it is a major rule; and the proposed effective date of the rule. The most recent Unified Agenda was published on July 5, 2024. Guidance documents and interpretive rules are typically available in the *Federal Register* and the Department's website.

The Department also works to ensure compliance with energy-efficiency standards and other existing DOE regulations. Information pertaining to resolved enforcement matters is publicly available. Where enforcement matters are pursued as administrative adjudications, the Office of Hearings and Appeals (OHA) conducts hearings and issues decisions with respect to the enforcement matter. Enforcement matters may also be settled prior to adjudication by OHA. Information and materials, including decisions, Notices of Noncompliance Determination, and Orders Assessing Civil Penalty are publicly available.[5] Where enforcement matters are pursued in federal court, filings and decisions are publicly accessible on PACER or other legal research databases.

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[1] 603 U.S. ___ (2024).

[2] 467 U.S. 837 (1984).

[3] The complete Unified Agenda, dating back to 1995, is available publicly at www.reginfo.gov. Additional information pertaining to agency rulemakings is also available on this website.

[4] 5 U.S.C. §§801-808.

[5] *See* https://www.energy.gov/gc/office-assistant-general-counsel-enforcement; https://www.energy.gov/gc/administrative-adjudication-civil-penalty-actions; https://www.energy.gov/oha/listings/decision-summaries.

In addition to adjudicating enforcement matters, OHA adjudicates various administrative matters over which the Secretary has delegated authority, with the exception of those within the jurisdiction of the Federal Energy Regulatory Commission. OHA's jurisdiction includes Freedom of Information Act appeals, personnel security hearings, and whistleblower matters. OHA's recent and archived decisions are publicly available.[6]

Finally, information pertaining to judicial challenges to DOE's rulemakings, adjudications, and enforcement actions and in which DOE is a party, including filings, orders and opinions, is available on PACER and legal research databases.

Thank you for your interest in this important topic. If you have questions regarding this matter, please contact Ms. Janie Thompson, Senior Advisor, Office of Congressional and Intergovernmental Affairs, at (202) 586-5450.

Sincerely,

ALEXANDRA TEITZ

Digitally signed by ALEXANDRA TEITZ
Date: 2024.09.10 20:36:35 -04'00'

Alexandra Teitz
Deputy General Counsel for Energy Efficiency &
Clean Energy Demonstrations

[6] *See* https://www.energy.gov/oha/office-hearings-and-appeals.

THE UNITED STATES TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT
WASHINGTON

September 20, 2024

The Honorable Eric Schmitt
United States Senate
Washington, D.C. 20510

Dear Senator Schmitt,

Thank you for your letter calling our attention to the recent Supreme Court opinion in *Loper Bright Enterprises v. Raimondo*.

The Office of the United States Trade Representative (USTR) is an office located in the Executive Office of the President.[1] Under U.S. law, USTR, among other things: is the lead agency for developing, and for coordinating the implementation of, U.S. international trade policy; is the principal advisor to the President on international trade policy; and is the lead negotiator on behalf of the United States in all international trade negotiations.[2] In carrying out this mission, USTR does maintain a few regulations as published in the *Code of Federal Regulations*. However, the vast majority of activities that USTR conducts is outside the regulatory space. With regard to the other activities of USTR, including international trade negotiations, requests for comment, and other notices, I would refer you to the USTR's website at www.ustr.gov and the *Federal Register*.

USTR remains committed to ensuring it complies with U.S. law, including, as appropriate, with the *Loper Bright Enterprises* opinion.

Sincerely,

Ambassador Katherine Tai
United States Trade Representative

[1] 19 U.S.C. § 2171(a).

[2] 19 U.S.C. § 2171(c)(1)(A)-(C).

cc:

The Honorable Kevin Cramer
The Honorable John Cornyn
The Honorable Rick Scott
The Honorable Cynthia M. Lummis
The Honorable Joni K. Ernst
The Honorable Ted Cruz
The Honorable Michael S. Lee
The Honorable Ted Budd
The Honorable Tommy Tuberville
The Honorable Thom Tillis
The Honorable Pete Ricketts
The Honorable Mike Braun
The Honorable Roger Marshall
The Honorable Bill Hagerty
The Honorable Jon Thune
The Honorable Marsha Blackburn
The Honorable Rand Paul
The Honorable Ron Johnson

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL RELATIONS
WASHINGTON, D.C. 20460

September 23, 2024

The Honorable Eric S. Schmitt
United States Senate
Washington, DC 20510

Dear Senator Schmitt:

On behalf of the U.S. Environmental Protection Agency, I am writing today in response to your letter dated July 11, 2024, regarding the Supreme Court decision, *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

EPA remains hard at work to steadfastly pursue our mission of protecting human health and the environment consistent with congressional direction. We are continuing to ensure Americans have clean air to breathe, clean water to drink, and healthy communities to live in. Thanks to the Biden-Harris Administration's historic investments in America and its ambitious climate and environmental agendas, EPA has taken significant steps in the past few years to tackle climate change, advance environmental justice, and protect the health and safety of communities across the country.

During the Biden-Harris Administration, EPA has been following the law and following the science, and doing so transparently. Carrying out EPA's life-saving public health mission involves rigorous and highly technical scientific research, modeling, and analysis. EPA is staffed with experts who have decades of experience protecting the air we breathe and the water we drink, cleaning up pollution, and fighting the climate crisis—and who are unwavering in their dedication to protecting public health and the environment. EPA will continue to follow the law and the science, as rulemakings we have promulgated during this Administration have done.

Congress has enacted numerous laws that require EPA to protect Americans' air, water, and land. For over a half-century, EPA has developed rules to effectuate those statutory commands, and we will continue to do so. In *Loper Bright*, the Supreme Court held that courts hearing challenges to agency actions under the Administrative Procedure Act "may not defer to an agency interpretation of the law simply because the statute is ambiguous." *Id.* at 2273. The Court also emphasized, though, that for many statutes the "best reading" is that "it delegates discretionary authority to an agency…." *Id.* 2263. For example, the Court explained that many statutes authorize agencies to "give meaning to a particular statutory term," "to prescribe rules to 'fill up the details' of a statutory scheme," or to "regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility…such as 'appropriate' or 'reasonable.'" *Id*. The Court also stated that courts "may seek aid from the

interpretations of those responsible for implementing particular statutes," which "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance…." *Id*. at 2262.

Much of the information you are interested in is publicly available on EPA's website, published in the Federal Register, posted to our public dockets on regulations.gov, available in the EPA Docket Center, and discussed in public court filings.

With respect to litigation specifically, EPA has a public listserv that allows any interested person or entity to receive notifications about new notices of intent to sue, petitions for review, complaints, proposed consent decrees, and proposed settlement agreements. Anyone may subscribe to email notifications at this address: https://www.epa.gov/ogc/email-subscriptions-notifications-about-new-litigation. Consistent with Administrator Regan's Litigation Transparency Memorandum, EPA makes additional litigation documents available in an easily searchable database, including notices of intent to sue (https://www.epa.gov/ogc/notices-intent-sue-us-environmental-protection-agency-epa); complaints and petitions for review (https://www.epa.gov/ogc/complaints-and-petitions-review); and proposed consent decrees and draft settlement agreements (https://www.epa.gov/ogc/proposed-consent-decrees-and-draft-settlement-agreements). For each of the draft consent decrees or proposed settlements listed on the site, the public is invited to comment before the agreement is finalized. These efforts increase transparency and provide the American public with opportunities to learn about EPA litigation or to comment on proposed settlement agreements.

With respect to rulemakings, EPA frequently provides for extensive public participation opportunities. EPA offices take affirmative steps to solicit and consider the views of stakeholders. EPA engages with states, Tribes, local governments, regulated entities, small businesses, non-governmental organizations, rural and urban communities, and people across America who have been historically underrepresented in governmental decision-making. We are confident that interested parties have a meaningful opportunity to participate in our regulatory and litigation processes.

Under the Biden-Harris Administration, EPA will continue to deploy the extraordinary expertise of the federal workforce and—consistent with the law and the science—will protect our health and the environment and ensure communities thrive and prosper.

Thank you for your interest. If you have any further questions, please contact me or have your staff contact Kristien Knapp in EPA's Office of Congressional and Intergovernmental Relations at Knapp.Kristien@epa.gov. Thank you.

Sincerely,

Tim Del Monico
Associate Administrator

cc: The Honorable Kevin Cramer
The Honorable John Cornyn
The Honorable Rick Scott
The Honorable Cynthia M. Lummis
The Honorable Joni K. Ernst
The Honorable Ted Cruz
The Honorable Michael S. Lee
The Honorable Ted Budd
The Honorable Tommy Tuberville
The Honorable Thom Tillis
The Honorable Pete Ricketts
The Honorable Mike Braun
The Honorable Roger Marshall
The Honorable Bill Hagerty
The Honorable John Thune
The Honorable Marsha Blackburn
The Honorable Rand Paul
The Honorable Ron Johnson

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

JEROME H. POWELL
CHAIR

September 26, 2024

The Honorable Eric S. Schmitt
United States Senate
Washington, D.C. 20510

Dear Senator:

Thank you for your letter dated July 11, 2024, regarding the Supreme Court of the United States's recent decision in *Loper Bright Enterprises v. Raimondo*.[1] At the Federal Reserve, we take seriously our obligation to follow the laws enacted by Congress, as interpreted by the Supreme Court. I want to assure you that we will continue to do so.

The independence accorded to our institution by Congress demands that the institution take great care to approach statutory interpretation in a studied, deliberate, and nonpartisan manner. This institutional value has guided our interpretations of the law as we consider regulatory actions.

Congress has charged the Federal Reserve with a number of important responsibilities by statute. We will continue to seek the best and most faithful reading of any grant of authority from Congress and will deploy its expertise within those confines. Thank you again for sharing your concerns. Responses to your specific questions are enclosed.

Sincerely,

Jerome H. Powell

Enclosures

[1] 144 S. Ct. 2244 (June 28, 2024).

Reponses to Questions from July 11, 2024

1. **Did your agency, including its adjudicative bodies, conduct a review of ongoing adjudications that may be impacted, including on appeal, by the *Loper Bright* decision modification of agency rulemaking?**

    a. **If so, please list the adjudications you have identified which may be impacted.**

    b. **If a review of adjudications is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the adjudications you have identified to-date which may be impacted.**

    c. **If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?**

We do not believe that there are any responsive agency adjudications.[2] The Federal Reserve Board (Board) has no ongoing adjudications that are required to be conducted under the formal hearing provisions of the Administrative Procedure Act (5 U.S.C. § 554) other than in enforcement actions, which are discussed below. The Board's orders on banking applications are available on the Board's website.[3]

2. **Has your agency conducted a review of ongoing civil enforcement actions that may be impacted, including on appeal, if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?**

    a. **If so, please list the civil enforcement actions you have identified which may be impacted.**

    b. **If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently civil enforcement actions you have identified to-date which may be impacted.**

    c. **If not, why hasn't the agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?**

The Board strives to arrive at the best reading of statutes in civil enforcement actions, as in all other areas. There are no ongoing enforcement actions brought by the Board or challenged in

[2] Our response considered adjudications in this question to refer to banking applications and enforcement actions.

[3] For information about the Federal Reserve System's actions on banking applications, *see* the H.2 report at https://www.federalreserve.gov/releases/h2/current/default.htm. Summaries are also provided in the Semiannual Report on Banking Applications Activity, available at https://www.federalreserve.gov/publications/semiannual-report-on-banking-applications-activity.htm.

federal court where the court deferred under *Chevron* to a Board agency interpretation of its statutory authority.[4]

3. Has the agency conducted a review of on-going[5] rulemakings that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

a. If so, please list the ongoing rulemakings you have identified which may be impacted.

b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the on-going rulemakings you have identified to-date which may be impacted.

c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

The Board always endeavors to propose and finalize legislative rules that are clearly within the Board's statutory authorities. Since January 20, 2021, the Board has issued 16 notices of proposed rulemaking, which are listed in the Appendix.[6] Information about the Board's ongoing rulemakings, as defined in the letter, can be found in the Board's Unified Regulatory Agenda. The Board does not consider any of these proposals to be based on an interpretation that would require *Chevron* deference.

4. Has your agency conducted a review of recently final[7] rules that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

a. If so, please list the recently final rules you have identified which may be impacted.

b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently final rules you have identified to-date which may be impacted.

c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

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[4] For a list of enforcement action orders on the Board's website, *see* https://www.federalreserve.gov/supervisionreg/enforcementactions.htm.

[5] As requested in the letter, for the purpose of question 3, "on-going" includes any item that appears in either of the two (2) most recent versions of the Unified Regulatory Agenda that has yet to progress to a final rule, interim final rule, or direct final rule published in the *Federal Register*.

[6] This response excludes extensions of comment periods.

[7] As requested in the letter, for the purpose of question 4, "recently final" includes any final rule, interim final rule, or direct final rule published in the *Federal Register* from January 21, 2021 to the present.

As mentioned above, the Board always endeavors to propose and finalize legislative rules that are clearly within the Board's statutory authorities. Since January 20, 2021, the Board has issued 68 final legislative rules, which are listed in the Appendix.[8] The Board does not consider any of these proposals or final rules to be based on an interpretation that would require *Chevron* deference.

5. Please describe any other work that your agency did to prepare for the decision in *Loper Bright*, including when that work commenced, its status, and key insights produced from this work.

The Board's legal staff monitored the *Loper Bright* case, as staff does with all notable cases relating to administrative law. Similarly, the Board's legal staff intends to carefully study how the *Loper Bright* decision is understood and applied by lower courts.

6. If your agency hasn't done other work, please explain why. If other work is planned, please describe the nature of that work, the date it will commence and the date your agency estimates it will conclude.

The Board's aim is always to act clearly within the boundaries of its statutory authority and the Board will continue to consider the impact of the *Loper Bright* decision in the normal course of its operations.

7. Please describe any guidance your agency has received from the Office of Management and Budget, the White House, or any other executive branch entity related to the core issues of *Loper Bright*, agency deference, the separation of powers, and your agency's authority.

The Board has not received any such guidance.

[8] This response excludes delegation rules and technical corrections.

Appendix

List of Proposed or Final Legislative Rules since January 20, 2021 (Chronological Order)

1. Membership of State Banking Institutions in the Federal Reserve System; Reports of Suspicious Activities Under Bank Secrecy Act, Notice of Proposed Rulemaking, 86 FR 6576 (January 22, 2021)
2. Capital Planning and Stress Testing Requirements for Large Bank Holding Companies, Intermediate Holding Companies and Savings and Loan Holding Companies, Final Rule, 86 FR 7927 (February 3, 2021)
3. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 86 FR 8853 (February 10, 2021)
4. Net Stable Funding Ratio: Liquidity Risk Measurement Standards and Disclosure Requirements, Final Rule, 86 FR 9120 (February 11, 2021)
5. Loans to Executive Officers, Directors, and Principal Shareholders of Member Banks, Interim Final Rule, 86 FR 9837 (February 17, 2021)
6. Netting Eligibility for Financial Institutions, Final Rule, 86 FR 11618 (February 26, 2021)
7. Regulatory Capital Rule: Emergency Capital Investment Program, Interim Final Rule, 86 FR 15076 (March 22, 2021)
8. Role of Supervisory Guidance, Final Rule, 86 FR 18173 (April 8, 2021)
9. Rules Regarding Availability of Information, Final Rule, 86 FR 18423 (April 9, 2021)
10. Federal Reserve Bank Capital Stock, Notice of Proposed Rulemaking, 86 FR 19152 (April 13, 2021)
11. Tax Allocation Agreements, Notice of Proposed Rulemaking, 86 FR 24755 (May 10, 2021)
12. Debit Card Interchange Fees and Routing, Notice of Proposed Rulemaking, 86 FR 26189 (May 13, 2021)
13. Loans to Executive Officers, Directors, and Principal Shareholders of Member Banks, Interim Final Rule, 86 FR 27507 (May 21, 2021)
14. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 86 FR 29937 (June 4, 2021)
15. Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire, Notice of Proposed Rulemaking, 86 FR 31376 (June 11, 2021)
16. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 86 FR 38905 (July 23, 2021)
17. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 86 FR 50213 (September 8, 2021)
18. Computer-Security Incident Notification Requirements for Banking Organizations and Their Bank Service Providers, Final Rule, 86 FR 66424 (November 23, 2021)
19. Appraisals for Higher-Priced Mortgage Loans Exemption Threshold, Final Rule, 86 FR 67843 (November 30, 2021)
20. Consumer Leasing (Regulation M), Final Rule, 86 FR 67847 (November 30, 2021)
21. Truth in Lending (Regulation Z), Final Rule, 86 FR 67851 (November 30, 2021)
22. Federal Reserve Bank Capital Stock, Final Rule, 86 FR 69578 (December 8, 2021)

23. Reserve Requirements of Depository Institutions, Final Rule, 86 FR 69577 (December 8, 2021)
24. Community Reinvestment Act Regulations, Final Rule, 86 FR 71813 (December 20, 2021)
25. Federal Reserve Bank Capital Stock, Final Rule, 87 FR 2027 (January 13, 2022)
26. Rules of Practice for Hearings, Final Rule, 87 FR 2312 (January 14, 2022)
27. Rules of Practice and Procedure, Notice of Proposed Rulemaking, 87 FR 22034 (April 13, 2022)
28. Regulation A: Extensions of Credit by Federal Reserve Banks, Final Rule, 87 FR 22811 (April 18, 2022)
29. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 87 FR 22812 (April 18, 2022)
30. Regulation A: Extensions of Credit by Federal Reserve Banks, Final Rule, 87 FR 29649 (May 16, 2022)
31. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 87 FR 29650 (May 16, 2022)
32. Community Reinvestment Act, Notice of Proposed Rulemaking, 87 FR 33884 (June 3, 2022)
33. Collection of Checks and Other Items by Federal Reserve Banks and Funds Transfers Through Fedwire, Final Rule, 87 FR 34350 (June 6, 2022)
34. Regulation A: Extensions of Credit by Federal Reserve Banks, Final Rule, 87 FR 38645 (June 29, 2022)
35. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 87 FR 38646 (June 29, 2022)
36. Regulation Implementing the Adjustable Interest Rate (LIBOR) Act, Notice of Proposed Rulemaking, 87 FR 45268 (July 28, 2022)
37. Regulation A: Extensions of Credit by Federal Reserve Banks, Final Rule, 87 FR 48441 (August 9, 2022)
38. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 87 FR 48442 (August 9, 2022)
39. Financial Market Utilities (Regulation HH), Notice of Proposed Rulemaking, 87 FR 60314 (October 5, 2022).
40. Regulation A: Extensions of Credit by Federal Reserve Banks, Final Rule, 87 FR 60868 (October 7, 2022)
41. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 87 FR 60869 (October 7, 2022)
42. Debit Card Interchange Fees, Final Rule, 87 FR 61217 (October 11, 2022)
43. Consumer Leasing (Regulation M), Final Rules, Official Interpretations, and Commentary, 87 FR 63666 (October 20, 2022)
44. Truth in Lending (Regulation Z), Final Rules, Official Interpretations, and commentary, 87 FR 63671 (October 20, 2022)
45. Appraisals for Higher-Priced Mortgage Loans Exemption Threshold, Final Rules, Official Interpretations, and Commentary, 87 FR 63663 (October 20, 2022)
46. Regulation A: Extensions of Credit by Federal Reserve Banks, Final Rule, 87 FR 68887 (November 17, 2022)

47. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 87 FR 68888 (November 17, 2022)
48. Reserve Requirements of Depository Institutions, Final Rule, 87 FR 73633 (December 1, 2022)
49. Federal Reserve Bank Capital Stock, Final Rule, 87 FR 73634 (December 1, 2022)
50. Community Reinvestment Act Regulations Asset-Size Thresholds, Final Rule, 87 FR 78829 (December 23, 2022)
51. Rules of Practice for Hearings, Final Rule, 88 FR 1497 (January 11, 2023)
52. Regulation A: Extensions of Credit by Federal Reserve Banks, Final Rule, 88 FR 2194 (January 13, 2023)
53. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 88 FR 2195 (January 13, 2023)
54. Regulations Implementing the Adjustable Interest Rate (LIBOR) Act, Final Rule, 88 FR 5204 (January 26, 2023)
55. Regulation A: Extensions of Credit by Federal Reserve Banks, Final Rule, 88 FR 8219 (February 8, 2023)
56. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 88 FR 8220 (February 8, 2023)
57. Regulation A: Extensions of Credit by Federal Reserve Banks, Final Rule, 88 FR 18379 (March 29, 2023)
58. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 88 FR 18380 (March 29, 2023)
59. Regulation A: Extensions of Credit by Federal Reserve Banks, Final Rule, 88 FR 30215 (May 11, 2023)
60. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 88 FR 30216 (May 11, 2023)
61. Quality Control Standards for Automated Valuation Models, Notice of Proposed Rulemaking, 88 FR 40638 (June 21, 2023)
62. Regulation A: Extensions of Credit by Federal Reserve Banks, Final Rule, 88 FR 50760 (August 2, 2023)
63. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 88 FR 50761 (August 2, 2023)
64. Regulatory Capital Rule: Risk-Based Capital Surcharges for Global Systemically Important Bank Holding Companies; Systemic Risk Report (FR Y-15), Notice of Proposed Rulemaking, 88 FR 60385 (September 1, 2023)
65. Regulatory Capital Rule: Large Banking Organizations and Banking Organizations With Significant Trading Activity, Notice of Proposed Rulemaking, 88 FR 64028 (September 18, 2023)
66. Long-Term Debt Requirements for Large Bank Holding Companies, Certain Intermediate Holding Companies of Foreign Banking Organizations, and Large Insured Depository Institutions, Notice of Proposed Rulemaking, 88 FR 64524 (September 19, 2023)
67. Debit Card Interchange Fees and Routing, Notice of Proposed Rulemaking, 88 FR 78100 (November 14, 2023)
68. Regulatory Capital Rules: Risk-Based Capital Requirements for Depository Institution Holding Companies Significantly Engaged in Insurance Activities, Final Rule, 88 FR 82980 (November 27, 2023)

69. Truth in Lending (Regulation Z), Final Rules, 88 FR 83322 (November 29, 2023)
70. Consumer Leasing (Regulation M), Final Rule, 88 FR 83318 (November 29, 2023)
71. Reserve Requirements (Regulation D), Final Rule, 88 FR 83316 (November 29, 2023)
72. Federal Reserve Bank Capital Stock, Final Rule, 88 FR 83317 (November 29, 2023)
73. Community Reinvestment Act Regulations Asset-Size Thresholds, Final Rule, 88 FR 87895 (December 20, 2023)
74. Rules of Practice and Procedure, Final Rule, 88 FR 89820 (December 28, 2023)
75. Rules of Practice for Hearings, Final Rule, 89 FR 2114 (January 12, 2024)
76. Community Reinvestment Act, Final Rule, 89 FR 6574 (February 2, 2024)
77. Financial Market Utilities, Final Rule, 89 FR 18749 (March 15, 2024)
78. Community Reinvestment Act; Supplemental Rule, Interim Final Rule, 89 FR 22060 (March 29, 2024)
79. Availability of Funds and Collection of Checks, Final Rule, 89 FR 43737 (May 20, 2024)
80. Quality Control Standards for Automated Valuation Models, Final Rule, 89 FR 64538 (August 7, 2024)
81. Anti-Money Laundering and Countering the Financing of Terrorism Program Requirements, Notice of Proposed Rulemaking, 89 FR 65242 (August 9, 2024)
82. Financial Data Transparency Act Joint Data Standards, Notice of Proposed Rulemaking, 89 FR 67890 (August 22, 2024)
83. Regulation A: Extensions of Credit by Federal Reserve Banks, Final Rule, 89 FR 78221 (September 25, 2024)
84. Regulation D: Reserve Requirements of Depository Institutions, Final Rule, 89 FR 78222 (September 25, 2024)

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

CHAIR

September 26, 2024

The Honorable Eric S. Schmitt
United States Senate
Washington, DC 20510

Dear Senator Schmitt:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to your July 11, 2024, letter regarding the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo.* Enclosed are the requested responses to questions from the *Post-Chevron* Working Group.

If you have any questions or need additional information, please contact me or have your staff contact Eugene Dacus, Director of the Office of Congressional Affairs, at (301) 415-1776.

Sincerely,

Christopher T. Hanson

Enclosure: As stated

Response to Questions from the *Post-Chevron* Working Group
Letter Dated July 11, 2024

Question 1: Did your agency, including its adjudicative bodies, conduct a review of ongoing adjudications that may be impacted, including on appeal, by the *Loper Bright* decision modification of agency rulemaking?

a. If so, please list the adjudications you have identified which may be impacted.

b. If a review of adjudications is ongoing, please provide the date it commenced, its status, the estimated completion date; and a list of the adjudications you have identified to-date which may be impacted.

c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

Answer: Yes, the NRC reviewed the impact of the *Loper Bright* decision on ongoing adjudications. There are no ongoing matters in which the NRC is relying on an interpretation of statutory authority that depended upon *Chevron* deference prior to the Court's decision in *Loper Bright.*

Question 2: Has your agency conducted a review of ongoing civil enforcement actions that may be impacted, including on appeal, if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

a. If so, please list the civil enforcement actions you have identified which may be impacted.

b. If a review is ongoing, please provide the date it commenced, its status. the estimated completion date, and a list of the recently civil enforcement actions you have identified. to-date which may be impacted.

c. If not, why hasn't the agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

Answer: Yes, the NRC reviewed the impact of the *Loper Bright* decision on civil enforcement actions. There are no ongoing enforcements matters in which the NRC is relying on an interpretation of statutory authority that depended upon *Chevron* deference prior to the Court's decision in *Loper Bright.*

Question 3: Has the agency conducted a review of on-going rulemakings that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

a. If so, please list the ongoing rulemakings you have identified which may be impacted.

b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the on-going rulemakings you have identified to-date which may be impacted.

c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

Answer: Yes, the NRC reviewed the impact of the *Loper Bright* decision ongoing rulemakings. There are no ongoing rulemakings for which the NRC intends to rely on an interpretation of the Atomic Energy Act of 1954, as amended, or other statute that is impacted by the *Loper Bright* decision.

Question 4: Has your agency conducted a review of recently final rules that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

a. If so, please list the recently final rules you have identified which may be impacted.

b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently final rules you have identified to-date which may be impacted.

c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

Answer: No final rules published by the NRG recently (since January 2021) relied on *Chevron* deference to support its statutory interpretations.

Question 5: Please describe any other work that your agency did to prepare for the decision in *Loper Bright,* including when that work commenced, its status, and key insights produced from this work.

Answer: The NRC did not undertake any specific work to prepare for the decision in *Loper Bright.*

Question 6: If your agency hasn't done other work, please explain why. If other work is planned, please describe the nature of that work, the date it will commence and the date your agency estimates it will conclude.

Answer: The NRC did not undertake specific work to prepare for the Court's holding in *Loper Bright* because the NRC has not generally relied on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* to support its statutory interpretations underlying our regulatory process in recent years. Going forward, no such work is planned because the Supreme Court's holding in *Loper Bright* is clear and the NRC expects that holding will have a minimal impact on our regulatory activities.

Question 7: Please describe any guidance your agency has received from the Office of Management and Budget, the White House, or any other executive branch entity related to the core issues of *Loper Bright,* agency deference, the separation of powers, and your agency's authority.

Answer: The agency has received no such guidance.

Identical letter sent to:

The Honorable Eric S. Schmitt
United States Senate
Washington, DC 20510

The Honorable John Cornyn
United States Senate
Washington, DC 20510

The Honorable Cynthia M. Lummis
United States Senate
Washington, DC 20510

The Honorable Ted Cruz
United States Senate
Washington, DC 20510

The Honorable Ted Budd
United States Senate
Washington, DC 20510

The Honorable Thom Tillis
United States Senate
Washington, DC 20510

The Honorable Mike Braun
United States Senate
Washington, DC 20510

The Honorable Bill Hagerty
United States Senate
Washington, DC 20510

The Honorable Marsha Blackburn
United States Senate
Washington, DC 20510

The Honorable Ron Johnson
United States Senate
Washington, DC 20510

The Honorable Kevin Cramer
United States Senate
Washington, DC 20510

The Honorable Rick Scott
United States Senate
Washington, DC 20510

The Honorable Joni K. Ernst
United States Senate
Washington, DC 20510

The Honorable Michael S. Lee
United States Senate
Washington, DC, 20510

The Honorable Tommy Tuberville
United States Senate
Washington, DC 20510

The Honorable Pete Ricketts
United States Senate
Washington, DC 20510

The Honorable Roger Marshall
United States Senate
Washington, DC 20510

The Honorable John Thune
United States Senate
Washington, DC 20510

The Honorable Rand Paul
United States Senate
Washington, DC 20510

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, DC 20530*

The Honorable Eric S. Schmitt
United States Senate
Washington, DC 20510

Dear Senator Schmitt:

This responds to your letter to the Department of Justice (Department), dated July 11, 2024, concerning the U.S. Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*,[1] (*Loper Bright*) and the rulemakings of the Department. We are sending identical responses to the other Members who joined your letter.

The Department is committed to upholding the rule of law and preserving the public's faith in the impartial administration of justice. Respect for precedent and established doctrine is a key pillar of the Department's work to uphold these core values. *Loper Bright* held that, when reviewing agency action under the Administrative Procedures Act, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[2] The Department is continuing to assess how *Loper Bright* impacts the Department's operations, including when litigating cases on behalf of and providing legal advice to other federal agencies. The Department has also addressed the *Loper Bright* decision in a number of recent filings in federal court, often at the request of those courts.

The Department takes seriously its obligation to exercise our statutory authorities lawfully and complies with all lawful court orders. The Department will continue to implement our statutory directives and obligations, including, as necessary and appropriate, through regulations, consistent with our statutory authorities.

Information concerning rulemakings, such as Notices of Proposed Rulemakings and Final Rules, are published to the Federal Register (federalregister.gov). In addition, the Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda), released semiannually, provides reporting on regulatory and deregulatory activities under development throughout the Federal Government. The most recent Unified Agenda (Spring 2024) is available at reginfo.gov and is sortable by agency.

[1] 144 S. Ct. 2244 (2024).
[2] *Loper*, 144 S.Ct. at 2273.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

CARLOS URIARTE

Digitally signed by CARLOS URIARTE
Date: 2024.09.30 14:38:21 -04'00'

Carlos Felipe Uriarte
Assistant Attorney General

USDA United States Department of Agriculture

Office of the Secretary
Washington, DC 20250

September 30, 2024

THE HONORABLE ERIC S. SCHMITT
United States Senate
387 Russell Senate Office Building
Washington, DC 20510

Dear Senator Schmitt:

I write in response to your letter dated July 11, 2024, cosigned by your colleagues, to the U.S. Department of Agriculture (USDA) regarding the recent U.S. Supreme Court decision *Loper Bright Enterprises v. Raimondo*.

I appreciate your interest in agency rulemakings. Rest assured that USDA officials are aware of and are continuing to review the recent *Loper Bright* decision. We undertake rulemaking, adjudicative, and enforcement actions based on existing statutory authorities and will continue to do so. We adhere to all applicable laws and authorities, including binding Supreme Court precedent, while ensuring that we do everything we can to carry out our mission to provide leadership on food, agriculture, natural resources, rural development, and nutrition.

USDA has been and will continue to be transparent regarding the rulemaking process. Information concerning rulemakings and other Departmental activities may be found in the Federal Register where we publish Notices of Proposed Rulemaking and Final Rules. Furthermore, information concerning current and forward-looking regulatory activities by USDA may be found in the Spring 2024 Unified Agenda of Regulatory and Deregulatory Actions.

If you have any additional questions, please have a member of your staff contact the USDA Office of Congressional Relations at (202) 720-7095 or ocr@usda.gov. A similar response is being sent to your colleagues.

Sincerely,

THOMAS J. VILSACK
Secretary

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

October 1, 2024

The Honorable Eric Schmidt
U.S. Senate
Washington, D.C. 20510

Dear Senator Schmidt:

I write in response to your letter of July 11, 2024, which was sent to the Department of the Treasury (the "Department") as well as several of its bureaus, concerning the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. __ (2024).

Significant regulatory matters on which the Department expects to take action in the coming year are included in the semiannual Unified Agenda of Regulatory and Deregulatory Actions (the "Unified Agenda"), which is available online at reginfo.gov. The Department's proposed and final rules are published in the Federal Register and available online at federalregister.gov. Proposed rules, along with supporting documents and received public comments, are also available at regulations.gov. The statutory authority for individual regulatory actions is identified in proposed and final rules published in the Federal Register and often noted on the Unified Agenda. Proposed and final rules also discuss the anticipated impacts of those rules, including a cost-benefit analysis when appropriate.

The Department takes seriously its obligation to issue rules that are consistent with its statutory authority, using procedures consistent with the Administrative Procedure Act and other relevant laws. The Department has always been bound by the text of the statutes it administers and has worked hard to explain the basis for the rules it issues. In so doing, the Department takes account of relevant court decisions, including *Loper Bright* and other cases, as appropriate the Department will continue operating in accordance with the law and consistent with its statutory mandates.

If you have any questions, please contact the Office of Legislative Affairs at legaffairs@treasury.gov.

Sincerely,

Corey Tellez

Corey A. Tellez
Acting Assistant Secretary
Office of Legislative Affairs

CC:
The Honorable Kevin Cramer
The Honorable John Cornyn
The Honorable Rick Scott
The Honorable Cynthia M. Lummis
The Honorable Joni K. Ernst
The Honorable Ted Cruz
The Honorable Michael S. Lee
The Honorable Ted Budd
The Honorable Tommy Tuberville
The Honorable Thom Tillis
The Honorable Pete Ricketts
The Honorable Mike Braun
The Honorable Roger Marshall
The Honorable Bill Hagerty
The Honorable Jon Thune
The Honorable Marsha Blackburn
The Honorable Rand Paul
The Honorable Ron Johnson

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

October 3, 2024

The Honorable Eric S. Schmitt
United States Senate
Washington, D.C. 20510

Dear Senator Schmitt:

I am writing in response to your July 12, 2024, letter concerning the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. ___(2024), and its potential impact on the Federal Trade Commission ("FTC" or "Commission"). Your letter asks for, among other things, information concerning FTC rulemakings or enforcement actions that may be affected by the Court's *Loper Bright* decision or that rely on the Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The *Chevron* doctrine, which the Court overruled in *Loper Bright*, provided federal courts with a methodology for interpreting ambiguous statutes administered by federal agencies like the FTC. *Chevron* did not provide the FTC or any other federal agency with independent authority to promulgate rules or to initiate enforcement actions. Instead, when the FTC issues rules or enforces the law, it acts pursuant to statutory authority that Congress has conferred upon the agency in the FTC Act or in other statutes. Indeed, Congress has charged the FTC with enforcing or administering the provisions of more than 80 statutes. Many of these statutes contain directives or authorizations from Congress to promulgate rules in certain areas. In carrying out these statutory mandates, the Commission follows the laws that Congress has enacted.

Since January 20, 2021, the FTC has not relied on *Chevron* deference to support its interpretation of any of its statutory authorities, either in a rulemaking context or in an enforcement action.[1] For this reason, I do not anticipate that *Loper Bright* will affect any rules the Commission has proposed or promulgated since I became Chair, nor do I expect the ruling to impact the outcome of any enforcement actions the FTC has initiated since that time. Of course, following *Loper Bright*, the FTC will continue to not rely on *Chevron* deference in any matter going forward.

[1] The Commission has finalized two rules during this time period – the Combatting Auto Retail Scams (CARS) Rule and Non-Compete Clause Rule – that have been challenged in federal court. *Chevron* is not an issue in those legal challenges.

Sincerely,

Lina M. Khan
Chair
Federal Trade Commission

U.S. Department of Transportation
Office of the Secretary of Transportation

Assistant Secretary
for Government Affairs

1200 New Jersey Avenue, SE
Washington, DC 20590

October 1, 2024

The Honorable Eric S. Schmitt
U.S. Senate
Washington, DC 20510

Dear Senator Schmitt:

This responds to your letters to the U.S. Department of Transportation (DOT or Department) and its Operating Administrations regarding the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) *(Loper Bright*).

The Department has always undertaken its rulemaking, adjudicative, and enforcement actions based on its existing statutory authorities and the administrative records developed for its actions. Because the Department is always mindful of its legal obligations, we will carefully review the Court's opinion in *Loper Bright* and continue to follow the law in all respects.

Information concerning rulemakings and other DOT activities is available in the Federal Register, where DOT publishes Notices of Proposed Rulemaking and Final Rules. The preambles of those actions articulate the reasoning behind DOT's decision making. Finally, information concerning the Department's current and forward-looking regulatory activities is published in the Spring 2024 Unified Agenda of Regulatory and Deregulatory Actions.

If you require further information, please contact me at craig.link@dot.gov. A similar letter has been sent to the cosigners of your letter.

Sincerely,

Craig Link
Principal Deputy Assistant Secretary for Governmental Affairs

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF LEGISLATION AND CONGRESSIONAL AFFAIRS

October 7, 2024

The Honorable Eric Schmitt
United States Senate
Washington, DC 20510

Dear Senator Schmitt:

Thank you for your July 11, 2024, letter to Secretary Miguel Cardona regarding the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*. Your letter was forwarded to me, and I am pleased to respond. I am sending an identical response to the co-signers of your letter.

The U.S. Department of Education (Department) takes seriously its obligation to faithfully exercise our statutory authority in accordance with all applicable laws. The Department will continue to implement our statutory directives and obligations, including, as necessary and appropriate, through regulations, consistent with our statutory authorities and all applicable law, including *Loper Bright*.

Thank you for writing about this important matter. Should you have further questions, your staff may contact our Office of Legislation and Congressional Affairs at (202) 401-0020.

Sincerely,

Gwen Graham
Assistant Secretary
Office of Legislation and Congressional Affairs

October 17, 2024

SENT BY EMAIL

The Honorable Eric S. Schmitt
Post-Chevron Working Group
387 Russell Senate Office Building
Washington, DC 20510

Dear Senator Schmitt,

Thank you for your letter dated July 11, 2024, concerning the Supreme Court's ruling in *Loper Bright Enterprises v. Raimondo*, 603 U. S. —, 144 S.Ct. 2244 (2024). The NCUA conducts its rulemakings using the authorities granted the NCUA Board to fulfill our statutory mandate. The NCUA's rulemakings are in accordance with the Administrative Procedure Act and relevant legal decisions, including *Loper Bright*.

Loper Bright was decided on June 28, 2024, and the agency is evaluating the opinion. As stated in your letter, *Loper Bright* has relevance for federal agency rulemakings and the NCUA is fully committed to complying with the Supreme Court's ruling. For your reference, the NCUA's rulemakings are available on our website at www.ncua.gov, at www.regulations.gov, and at www.reginfo.gov/public per the Unified Agenda.

Thank you again for contacting the NCUA on this issue. Please do not hesitate to contact me at (703) 518-6330 if you have any questions or comments.

Sincerely,

Samuel Schumach
Deputy Director, Office of External Affairs and Communications

October 30, 2024

The Honorable Eric S. Schmitt
Post-*Chevron* Working Group
United States Senate
Washington, D.C. 20510

Dear Senator Schmitt:

Thank you for your letter dated, July 10, 2024, regarding the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo.*[1]

The Office of the Comptroller of the Currency (OCC) is an independent bureau of the Department of the Treasury with a statutory mission is to ensure that national banks, federal savings associations, and federal branches and agencies of foreign banks operate in a safe and sound manner, provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations. The OCC is committed to achieving that mission in a manner fully consistent with its legal responsibilities. To that end, the OCC closely monitors judicial decisions that may impact the agency.

We continue to assess the recent decision in *Loper Bright.* Subject to that ongoing assessment, our responses to your questions follow below.

First, you asked whether the OCC has conducted a review of ongoing adjudications and civil enforcement actions, as well as certain ongoing and recently final rulemakings, which may be impacted by the *Loper Bright* decision. As noted, the agency's assessment of the decision's potential impacts is ongoing. The OCC therefore has no further information to report at this time.

Please note that the OCC publishes notices of proposed legislative rules and final legislative rules in the *Federal Register,* available at https://www.federalregister.gov/agencies/comptroller-of-the-currency. It also publishes final rules online, available at https://occ.gov/topics/laws-and-regulations/occ-regulations/final-issuances/index-final-issuances.html. Agency submissions to the Unified Agenda regarding ongoing regulatory initiatives are available online, at https://www.reginfo.gov/public/do/eAgendaMain. Comptroller Decisions and Orders in completed enforcement matters are available at https://www .occ.treas.gov/topics/laws-and-regulations/enforcement-actions/comptrollers-orders.html, and active enforcement actions are available at https://apps.occ.gov/EASearch. To the extent it may be useful to you, the OCC

'*Loper Bright Enterprises v. Raimondo,* 144 S.Ct. 2244 (2024).

publishes its chartering and licensing decisions in weekly bulletins, made available online, at https://www.occ.treas.gov/topics/charters-and-licensing/weekly-bulletin/index-weekly-bulletin.html/. The OCC also directs your attention to the following agency actions currently pending in the federal courts: *In the Matter of Laura Akahoshi,* No. AA-EC-2018-20 (OCC), now pending as *Laura Akahoshi v. Office of the Comptroller of the Currency,* No. 23-938 (9th Cir.), and *In the Matters of Saul Ortega and David Rodgers, Jr.,* Nos. AA-EC-2017-44 & AA-EC-2017-45 (OCC), now pending as *Saul Ortega and David Rodgers, Jr. v. Office of the Comptroller of the Currency,* No. 23-60617 (5th Cir.).

Second, you asked whether the OCC conducted any work prior to the Supreme Court's issuance of the *Loper Bright* decision to prepare for that decision. The OCC did not attempt to prejudge the decision. As noted, the OCC continues to assess on an ongoing basis any potential impacts of the decision.

Third, you ask that the OCC describe any guidance it received from the Office of Management and Budget (0MB), the White House, or any other executive branch entity related to *Loper Bright,* agency deference, the separation of powers, and OCC authority. The OCC is an independent bureau of the Department of the Treasury and an "independent regulatory agency," as defined in 44 U.S.C. § 3502(5). Thus, while the OCC communicates from time to time with the 0MB, the White House, and other executive branch entities-including with regard to one or more matters that you reference-it generally is not bound by any guidance that they may extend. The ace therefore respectfully refers you to the OMB and the White House for further information relating to your inquiry.

We appreciate this opportunity to respond to your inquiry. If you have any questions, please contact Carrie Moore, Director, Public Affairs and Congressional Relations at (202) 649-6737.

Sincerely,

Michael J. Hsu
Acting Comptroller of the Currency

SOCIAL SECURITY

The Commissioner

November 25, 2024

The Honorable Eric S. Schmitt
U.S. Senate Washington, DC
20510

Dear Senator Schmitt:

Thank you for your July 10, 2024, letter about how the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* may impact the Social Security Administration. I appreciate your interest in this important matter.

In *Loper Bright,* the Court held that under the Administrative Procedure Act, "courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority" and, thus, "may not defer to an agency interpretation of the law simply because a statute is ambiguous." It is unclear how lower courts might apply *Loper Bright* when deciding challenges to Social Security rules. Of course, any such challenge filed in court would be publicly available. Our rulemakings are also publicly available in the Federal Register.

The programs and services we administer are vital to the public. For nearly 90 years, Social Security has provided income security for retirees, individuals with disabilities, and families that lose a wage-earner. We take our duty to faithfully administer the Social Security Act very seriously and will continue to follow all applicable authorities when we engage in rulemaking.

I hope this information is helpful. If you have further questions, please contact me, or have your staff contact Tom Klouda, our Deputy Commissioner for Legislation and Congressional Affairs, at (202) 358-6030. I am sending the same response to the other cosigners of your letter.

Sincerely,

Martin O'Malley Commissioner

SOCIAL SECURITY ADMINISTRATION BALTIMORE, MD 21235-0001

DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON

December 4, 2024

The Honorable Eric S. Schmitt
United States Senate
Washington, DC 20510

Dear Senator Schmitt:

Thank you for your July 11, 2024, co-signed letter to the Department of Veterans Affairs (VA) regarding the recent U.S. Supreme Court decision on *Loper Bright Enterprises et al v. Raimondo,* 144 S.Ct. 2244 (2024).

In *Loper Bright,* the Supreme Court held that in hearing challenges to agency action under the Administrative Procedure Act, where a statute is susceptible to multiple meanings and Congress did not delegate interpretive authority to an agency, a court must independently decide what constitutes the best understanding of the statute. The Court held that courts "must exercise their independent judgment" and "may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Id.* at 2273. Under *Loper Bright,* courts may invalidate rules if an agency has not adopted what the court considers to be the "best" interpretation of the relevant statute. *Id.* at 2266. To make that determination, a court will generally examine the statute's text, structure (context), history, and purpose.

Importantly, *Loper Bright* notes that an agency may still receive deferential review when Congress has explicitly delegated policymaking or interpretive authority to it. "[W]hen a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it." *Id.* at 2273. The court's role is to "independently identify and respect such delegations of authority [and] police the outer statutory boundaries of those delegations." *Id.* at 2268.

Loper Bright further acknowledged that agency interpretations, though not binding on courts, may be useful in determining a statute's meaning if the issue implicates the agency's expertise and experience. "[C]ourts may ... seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.....' And interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning." *Id.* at 2262 (quoting *Skidmore v. Swift* & Co., 323 U.S. 134, 140 (1944)). Moreover, "an agency's interpretation.....may be especially informative to the extent it rests on factual premises within the agency's expertise. Such expertise has always been one of the factors which

may give an Executive Branch interpretation particular power to persuade." *Id.* at 2267 (internal quotation marks and citations omitted).

The Veterans Benefits Administration (VBA) has issued more than 1 million adjudications annually for the past few years as it decides Veterans' claims for benefits. Similarly, the Board of Veterans' Appeals has issued on average over 100,000 decisions annually. VA also has proposed and promulgated several hundred agency rules and regulations in recent years. Accordingly, we have not conducted the type of reviews contemplated in your letter.

We will continue to consider the *Loper Bright* decision carefully as we ensure that we are doing everything we can to meet our sacred duty of providing care and benefits to Veterans and their families, survivors, and caregivers.

As always, thank you for your continued support of our mission to honor President Lincoln's promise. I have sent a similar letter to the signatories of your letter.

Sincerely,

Patricia L. Ross
Assistant Secretary for Congressional
and Legislative Affairs

FEDERAL DEPOSIT INSURANCE CORPORATION WASHINGTON, D.C. 20429

MARTIN J. GRUENBERG
CHAIRMAN

December 20, 2024

The Honorable Eric S. Schmitt
Chair, The *Post-Chevron* Working Group
United States Senate
Washington, D.C. 20510

Dear Chair Schmitt:

Thank you for your correspondence regarding the impact of the recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo.* The Federal Deposit Insurance Corporation (FDIC) believes the reversal of the doctrine articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* will not have a significant impact on FDIC rulemakings and adjudicative proceedings.

Enclosed, please find a document prepared by FDIC staff that responds to the specific questions set forth in your letter.

Your interest in this matter is appreciated. If you or your staff have questions, please contact me or Andy Jiminez, Director, Office of Legislative Affairs at (202) 898-6761.

Sincerely,

Martin J. Gruenberg

Martin J. Gruenberg

cc: The Honorable Kevin Cramer
United States Senate

The Honorable John Comyn
United States Senate

The Honorable Rick Scott
United States Senate

The Honorable Cynthia M. Lummis
United States Senate

The Honorable Joni K. Ernst
United States Senate

The Honorable Michael S. Lee
United States Senate

The Honorable Tommy Tuberville
United States Senate

The Honorable Pete Ricketts
United States Senate

The Honorable Roger Marshall
United States Senate

The Honorable Jon Thune
United States Senate

The Honorable Rand Paul
United States Senate

The Honorable Ted Cruz
United States Senate

The Honorable Ted Budd
United States Senate

The Honorable Thom Tillis
United States Senate

The Honorable Mike Braun
United States Senate

The Honorable Bill Hagerty
United States Senate

The Honorable Marsha Blackbum
United States Senate

The Honorable Ron Johnson
United States Senate

Enclosure: Information Responding to Questions from the U.S. Senate's Post-Chevron Working Group Regarding the Impact of *Loper Bright Enterprises v. Raimondo*

Question 1. Did your agency, including its adjudicative bodies, conduct a review of ongoing adjudications that may be impacted, including on appeal, by the *Loper Bright* decision modification of agency rulemaking?

- **a. If so, please list the adjudications you have identified which may be impacted.**
- **b. If a review of adjudications is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the adjudications you have identified to-date which may be impacted.**
- **c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?**

Yes. The FDIC reviewed pending deposit insurance applications, bank merger applications, and enforcement actions. Based on this review, the FDIC does not believe it has any ongoing adjudications that may be impacted by *Loper Bright.*[1]

Question 2. Has your agency conducted a review of ongoing civil enforcement actions that may be impacted, including on appeal, if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

- **a. If so, please list the civil enforcement actions you have identified which may be impacted.**
- **b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently civil enforcement actions you have identified to-date which may be impacted.**
- **c. If not, why hasn't the agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?**

Yes. There are no ongoing civil enforcement actions that the FDIC believes may be impacted, including on appeal, by the *Loper Bright* decision.

Question 3. Has the agency conducted a review of on-going[2] rulemakings that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

- **a. If so, please list the ongoing rulemakings you have identified which may be impacted.**
- **b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the on-going rulemakings you have identified to-date which may be impacted.**

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[1] The FDIC maintains a list of enforcement actions on its website; see FDIC: Enforcement Decisions and Orders - Press Release Orders. A list of decisions on deposit insurance applications is available at: Decisions on Bank Applications - Deposit Insurance. Our annual report on bank merger decisions is available at: Annual Report To Congress.

[2] For the purpose question 3., "on-going" includes any item that appears in either of the two (2) most recent versions of the Unified Regulatory Agenda that has yet to progress to a final rule, interim final rule, or direct final rule published in the *Federal Register.*

c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

The FDIC is unaware of whether, and on what grounds, a hypothetical plaintiff would challenge any final rule based on existing agency proposals. The FDIC's proposed rules are listed at https://www.fdic.gov/federal-register-publications.

Question 4. Has your agency conducted a review of recently final[3] rules that may be impacted if *Chevron* is abrogated or significantly narrowed by the *Loper Bright* decision?

a. If so, please list the recently final rules you have identified which may be impacted.
b. If a review is ongoing, please provide the date it commenced, its status, the estimated completion date, and a list of the recently final rules you have identified to-date which may be impacted.
c. If not, why hasn't your agency commenced a review? And is a review planned, and if so, when will it commence and when does the agency estimate it will conclude?

Yes. The FDIC does not believe that any recently issued final agency rules may be impacted by the *Loper Bright* decision.

Question 5. Please describe any other work that your agency did to prepare for the decision in *Loper Bright,* including when that work commenced, its status, and key insights produced from this work.

The FDIC continuously monitors litigation that may affect the agency.. No specific action was taken in anticipation of the decision in *Loper* Bright..

Question 6. If your agency hasn't done other work, please explain why. If other work is planned, please describe the nature of that work, the date it will commence and the date your agency estimates it will conclude.

The FDIC's Legal staff intends to continue monitoring the application of the *Loper Bright* decision in the courts.

Question 7. Please describe any guidance your agency has received from the Office of Management and Budget, the White House, or any other executive branch entity related to the core issues of *Loper Bright,* agency deference, the separation of powers, and your agency's authority.

The FDIC has not received any guidance on the core issues of *Loper Bright,* agency deference, separation of powers, or the FDIC's authority.

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[3] For the purpose of question 4., "recently final" includes any final rule, interim final rule, or direct final rule published in the *Federal Register* from January 21, 2021 to the present.