No. 23-1823

In the United States Court of Appeals for the Federal Circuit

JULIAN LESKO,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
No. 1:22-cv-00715-CNL (Judge Carolyn N. Lerner)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 23-1823

Short Case Caption Lesko v. United States

Filing Party/Entity The Chamber of Commerce of the United States of America

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1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
The Chamber of Commerce of the United States of America		

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4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

On March 18, 2025, the Court requested supplemental briefing on how the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), affects the outcome in this case. Given

[*] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. In its March 18, 2025, order, the Court invited *amicus curiae* briefs to be filed without consent and leave of the court.

the breadth of its membership and its long history of challenging regulations that violate the Administrative Procedure Act (APA) and related doctrines, the Chamber has a strong interest in this Court's approach to that question and is uniquely positioned to speak to the effects of *Loper Bright*. Indeed, the Chamber has filed numerous *amicus* briefs about the impact of *Loper Bright* in courts across the country. *See, e.g.*, U.S. Chamber Supp. *Amicus* Br., *3M Co. v. Comm'r*, No. 23–3772 (8th Cir., filed Oct. 2, 2024); U.S. Chamber *Amicus* Br., *Coca-Cola Co. v. Comm'r*, No. 24–13470 (11th Cir., filed Mar. 18, 2025); U.S. Chamber Amicus Br., *Florida E. Coast Railway v. FRA*, No. 24–11076 (11th Cir., filed Aug. 2, 2025).

SUMMARY OF ARGUMENT

Last Term, in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court decisively rejected *Chevron* deference. Under that doctrine, courts were required to defer to a federal agency's interpretation of ambiguous statutory language so long as that interpretation was "reasonable." *Chevron v. NRDC*, 467 U.S. 837, 842–43 (1984). Now, courts must exercise their independent judgment when it comes to the meaning of statutes that govern federal agencies. That means courts

must conduct *de novo* review and use all of the traditional tools of statutory interpretation to arrive at the "best" reading of the statute.

To be sure, the best reading of the statute could be that Congress authorized the agency to exercise a degree of policymaking discretion. *Loper Bright* recognized two categories of such delegations of authority: (1) when Congress specifically and expressly instructs the agency to define or give meaning to a statutory term; and (2) when Congress grants the agency general rulemaking authority, and the agency "fills up the details" of a statutory scheme or regulates subject to the limits imposed by a statutory term that leaves the agency with flexibility, such as "appropriate" or "reasonable."

When a reviewing court concludes that the best reading of the statute is that Congress has delegated policymaking authority to an agency, the court must still ensure that the delegation is consistent with the Constitution, that the agency's policymaking does not exceed the boundaries of the statutory delegation, and that the agency's policymaking complies with the reasoned-decisionmaking requirements of the APA.

In terms of how this Court should interpret the statutory phrase "officially ordered or approved" at issue in this case, the answer is clear

from *Loper Bright*: the Court must exercise its independent judgment to arrive at the best interpretation of the statute.[1] That entails using all of the tools of statutory interpretation. This is not a case where Congress has delegated policymaking discretion to the agency. Instead, determining the meaning of "officially ordered or approved" is a matter of ordinary statutory interpretation that requires this Court to exercise its independent judgment under *Loper Bright*.

ARGUMENT

I. *Loper Bright* Requires Courts To Exercise Independent Judgment When Interpreting Statutes.

For decades, the Supreme Court had instructed courts to defer to federal agencies' reasonable interpretations of ambiguous statutes they administer. *See Chevron*, 467 U.S. at 842–43. In recent years, however, the Court began retreating from that approach, culminating last Term with the elimination of *Chevron* deference in *Loper Bright*. Judicial review now requires courts to "exercise their independent judgment in

[1] *Amicus* takes no position on the meaning of the specific statutory phrase "officially ordered or approved." Nor does *amicus* take a position on any potentially binding circuit precedent at issue in this case regarding that question, or whether the Federal Circuit *en banc* should reconsider any such precedent.

deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright*, 603 U.S. at 412.

Analytically, moving from *Chevron* deference to *Loper Bright* "independent judgment" is an important shift in administrative law. Under *Chevron*, courts were instructed to adopt "a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–41 (1996). The *Loper Bright* Court rejected this presumption. Instead, *Loper Bright* instructs reviewing courts to follow "the APA's demand that courts exercise independent judgment in construing statutes administered by agencies." 603 U.S. at 406; *see also* 5 U.S.C. § 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."). In other words, courts do what they otherwise would do in an ordinary

statutory interpretation case: resolve any interpretive questions by applying the traditional tools of statutory interpretation.

Arriving at the best interpretation—or a "fair reading," as Justice Scalia would frame it—involves "determining the application of a governing text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 33 (2012). Under the traditional tools of statutory interpretation, courts begin with the text of the statute. "Words are to be understood in their ordinary, everyday meanings," Justice Scalia explained, "unless the context indicates that they bear a technical sense." *Id.* at 69.

This independent judgment also often involves the application of a collection of semantic, contextual, syntactic, structural, and substantive canons of statutory interpretation that jurists have recognized and developed over the centuries. *See id.* at 53–339 (chronicling 57 distinct canons of statutory interpretation). These interpretive tools, or canons, do not just focus myopically on the statutory terms that are most directly in dispute. "In ascertaining the plain meaning of the statute," the Supreme

Court has instructed that "the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *see also* Scalia & Garner, *supra*, at 167–69 (classifying this interpretive tool as "the whole-text canon").

In *Loper Bright*, the Supreme Court referred to another interpretive tool that courts have applied in the context of statutes that have been interpreted by federal agencies. Eight decades ago in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court suggested that courts should give "weight" to an agency interpretation based on "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." *Id.* at 140. In *Loper Bright*, the Court was careful to frame *Skidmore* as a form of "respect" based on the agency's power to persuade. *See, e.g.*, 603 U.S. at 412–13 ("Careful attention to the judgment of the Executive Branch may help inform that inquiry."); *id.* at 403 ("The better presumption is therefore that Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch."). In

other words, sometimes the government may have views that are helpful to understand a statutory framework, perhaps due to its informed and contemporaneous understanding of the meaning of the statute at its enactment or its specialized expertise implementing a complex statutory scheme. When the government's views are thoughtful and well informed, they may well carry significant respect.

In sum, the ultimate objective of courts exercising their independent judgment is to "use every tool at their disposal to determine the *best* reading of the statute and resolve the ambiguity"—"'the reading the court would have reached' if no agency were involved." *Loper Bright*, 603 U.S. at 400 (emphasis added) (quoting *Chevron*, 467 U.S. at 843 n.11). Gone are the days of *Chevron* deference when statutory ambiguity "somehow relieved [courts'] obligation to independently interpret the statutes." *Id.*

II. *Loper Bright* Cabins The Degree Of Discretion Federal Agencies Have For Policymaking.

Loper Bright rejected *Chevron*'s holding that statutory ambiguity authorizes agencies to exercise discretion. As discussed above, statutory ambiguity calls for judicial interpretation, not agency policymaking. Thus, if agencies are to exercise policymaking discretion, it must be because the statute directs them to do so. In *Loper Bright*, the Supreme

Court identified two categories of statutory language—specific and general—that can mean that Congress has delegated a degree of policymaking authority to an agency.

A. Congress Can Specifically Delegate Authority To Agencies To Define Statutory Terms.

In *Loper Bright*, the Supreme Court explained that Congress may vest in "an agency the authority to give meaning to a particular statutory term." 603 U.S. at 394. The Court's citations in *Loper Bright* are instructive. *See id.* at 395 & n.5 (citing *Batterton v. Francis*, 432 U.S. 416, 425 (1977); 29 U.S.C. § 213(a)(15); 42 U.S.C. § 5846(a)(2)).

Consider *Batterton*. In this pre-*Chevron* case, the Supreme Court assessed the meaning of "unemployment" in a particular section of the Social Security Act. *See* 432 U.S. at 418–19. The Court explained that "[o]rdinarily, administrative interpretations of statutory terms are given important but not controlling significance"; they are entitled to "mere deference or weight." *Id.* at 424, 425. The statutory provision at issue in *Batterton*, however, did not raise an ordinary statutory interpretation question. Instead, "Congress in [42 U.S.C. § 607(a)] expressly delegated to the Secretary the power to prescribe standards for determining what constitutes 'unemployment' for purposes of AFDC-UF eligibility." *Id.* at 425.

The statutory provision provided that "[t]he term 'dependent child' shall . . . include a needy child . . . who has been deprived of parental support or care by reason of the unemployment (*as determined in accordance with standards prescribed by the Secretary*) of his father . . . ." *Id.* at 418 n.2 (quoting 42 U.S.C. § 607 (1977)) (emphasis added). Because of this specific delegation, the Supreme Court in *Batterton* explained that "Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term." *Id.* at 245.

To be sure, *Batterton* was decided in a different era of statutory interpretation—nearly a half century ago and some seven years before *Chevron* itself. As such, the Supreme Court's use of "interpret" there is understandably antiquated. When Congress has specifically charged an agency to define terms in a statute, the agency's subsequent definition is not an act of interpretation, but one of policymaking. In *Loper Bright*, the Supreme Court appreciated this nuance, by reframing the statutory provision in *Batterton* as an example of Congress's "'expressly delegat[ing]' to an agency the authority to *give meaning* to a particular statutory term." 603 U.S. at 394–95 (quoting *Batterton*, 423 U.S. at 425) (emphasis added).

The other two examples the *Loper Bright* Court invoked for specific delegation similarly concern instances where Congress specifically and expressly tasked the agency with defining certain terms in a statute. *See* 603 U.S. at 395 n.5. The Court cited a provision of the Fair Labor Standards Act that exempts "any employee employed 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*)." 29 U.S.C. § 213(a)(15) (emphasis added). And it cited a provision of the Atomic Energy Act that requires notification to the Nuclear Regulatory Commission when a facility or activity regulated under the statute "contains a defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*." 42 U.S.C. § 5846(a)(2) (emphasis added)).

It is important to underscore what the Supreme Court did *not* categorize as a specific delegation to define statutory terms: provisions that generally authorize the agency to engage in rulemaking or adjudicative activities, including to set standards through regulation. When Congress wants to authorize an agency to give meaning to statutory language, it

must expressly direct the agency to define, or give meaning to, certain terms. And the agency must follow the procedures Congress requires—such as notice-and-comment rulemaking or formal adjudication—to promulgate those definitions.

A contrary holding would effectively gut *Loper Bright*'s overruling of *Chevron* deference. Congress has given most agencies general rulemaking authority. *See* Jennifer L. Selin & David E. Lewis, *Sourcebook of United States Executive Agencies* 118–19 (Admin. Conf. of U.S., 2d ed. 2018). If that were enough to justify judicial deference to an agency's reading of a statute, courts would not be permitted to exercise "independent judgment" in most cases. That is not what the Supreme Court intended when it identified the narrow circumstances in which courts should respect the policymaking discretion that statutes provide to agencies. Moreover, reading a general rulemaking provision in this way would render superfluous *Loper Bright*'s specific delegation category as well as each statutory provision in which Congress has specifically delegated definitional authority to an agency.

B. When Congress Grants General Rulemaking Authority, Agencies Can Fill Up Details And Regulate Subject To The Limits Of Flexible Terms.

The fact that general rulemaking provisions do not grant agencies authority to define statutory terms does not mean that those provisions are irrelevant for delegation purposes under *Loper Bright*. They simply serve a different purpose: giving agencies authority to "fill up the details" of a statutory scheme and to "regulate subject to the limits imposed by a term or phrase that 'leaves agencies with flexibility,' such as 'appropriate' or 'reasonable.'" *Loper Bright*, 603 U.S. at 395 (citations omitted).

1. Fill Up The Details. When Congress enacts a regulatory scheme, it typically charges an agency with implementing Congress's policy decisions. That implementation often requires agencies to fill up the minor details in the statutory scheme. To vest an agency with this implementation authority, Congress includes a general rulemaking or standards-setting provision in the statute. *See, e.g.*, 5 U.S.C. § 5548 (granting OPM general rulemaking authority to "prescribe regulations, subject to the approval of the President, necessary for the administration of this subchapter"); *id.* § 1104 (granting OPM standards-setting authority to "establish standards which shall apply to the activities of the Office"); 26

U.S.C. § 7805(a) (granting the Treasury Secretary general rulemaking authority to "prescribe all needful rules and regulations for the enforcement of this title"). In *Loper Bright,* the Supreme Court recognized that when Congress has granted an agency such general rulemaking authority, a reviewing court exercising its independent judgment may conclude that the best interpretation of the statute authorizes the agency to fill up statutory details. *See Loper Bright*, 603 U.S. at 394–96.

With respect to filling up the details, the *Loper Bright* Court referred to *Wayman v. Southard*, 23 U.S. 1 (1825). As Justice Gorsuch has explained, "[i]n *Wayman v. Southard*, this Court upheld a statute that instructed the federal courts to borrow state-court procedural rules but allowed them to make certain 'alterations and additions.'" *Gundy v. United States*, 588 U.S. 128, 157 (2019) (Gorsuch, J., dissenting). Since "Congress had announced the controlling general policy when it ordered federal courts to follow state procedures," Justice Gorsuch observed, "the residual authority to make 'alterations and additions' did no more than permit courts to fill up the details." *Id.* at 157–58. Or as the *Wayman* Court put it, the Constitution draws a line between "important subjects, which must be entirely regulated by the legislature itself, from those of

less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Wayman*, 23 U.S. at 43.

In his *Gundy* dissent, Justice Gorsuch provided several other helpful examples of statutes filling up the details:

> In *In re Kollock*, for example, the Court upheld a statute that assigned the Commissioner of Internal Revenue the responsibility to design tax stamps for margarine packages. Later still, and using the same logic, the Court sustained other and far more consequential statutes, like a law authorizing the Secretary of Agriculture to adopt rules regulating the "use and occupancy" of public forests to protect them from "destruction" and "depredations." Through all these cases, small or large, runs the theme that Congress must set forth standards "sufficiently definite and precise to enable Congress, the courts, and the public to ascertain" whether Congress's guidance has been followed.

588 U.S. at 158 (Gorsuch, J., dissenting) (footnotes omitted).

From these various examples it becomes clear that "fill up the details" delegation does not concern interpreting or providing meaning to particular terms in a statute. Instead, this category involves filling the interstitial gaps in a statutory scheme. A common approach Congress takes to authorize such gap-filling is to authorize the agency to set standards to implement a particular statutory program.

2. Flexible Terms. In *Loper Bright*, the Supreme Court also recognized that Congress sometimes uses capacious statutory terms like "appropriate" or "reasonable" that "'leave[] agencies with flexibility.'" 603 U.S. at 395 (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).

For example, the Court referred to a provision of the Clean Air Act, construed in *Michigan v. EPA*, that directs the EPA to regulate power plants "if the Administrator finds such regulation is *appropriate and necessary*." 42 U.S.C. § 7412(n)(1)(A) (emphasis added). With respect to "appropriate and necessary," the Court has observed that "[o]ne does not need to open up a dictionary in order to realize the capaciousness of this phrase." *Michigan v. EPA*, 576 U.S. at 752. In other words, the best interpretation of "appropriate and necessary" is that Congress has delegated a degree of policymaking authority to the agency in deciding whether to regulate, subject to a reviewing court's independent judgment of the limits of what "appropriate and necessary" means.

III. *Loper Bright* Reaffirms Existing Guardrails On Agency Policymaking.

If a reviewing court determines that Congress has delegated policymaking authority to a federal agency—whether by directing the agency to define a statutory term, to fill up the details of a statutory scheme, or

to regulate subject to limits like "reasonable" or "appropriate"—that is not the end of the matter. "When the best reading of a statute is that it delegates discretionary authority to an agency," the *Loper Bright* Court reaffirmed, "the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits." 603 U.S. at 395. Accordingly, the reviewing court must enforce the guardrails of both the Constitution and all relevant statutory requirements.

A. The APA and *Loper Bright* Require Courts To Fix The Boundaries Of Statutory Delegations.

The APA commands that reviewing courts must set aside an agency action if it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). Throughout its decision in *Loper Bright*, the Supreme Court also reinforced that the independent judgment inquiry extends beyond courts determining the best meaning of the statute. When a court determines that the best interpretation of a provision is that Congress has delegated a degree of discretion to the agency, the next step is for the court to "exercise [its] independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper Bright*, 603 U.S. at 412.

In articulating this principle, the Court invoked Professor Henry Monaghan's article, Marbury *and the Administrative State*, and his statement that courts must "fix the boundaries of delegated authority." *Loper Bright*, 603 U.S. at 395 (quoting Henry P. Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 27 (1983)) (cleaned up). As Monaghan explained, this "judicial role" involves courts "defining the range of permissible criteria" and "specify[ing] what the statute cannot mean, and some of what it must mean, but not all that it does mean." Monaghan, *supra*, at 27.

Revisiting *Loper Bright*'s examples of statutory delegations helps underscore that judicial role. With respect to specific delegations for agencies to define statutory terms, agencies' discretion is not boundless. For instance, in *Batterton*, if the agency had defined "unemployment" to include a parent who had a full-time, full-salaried job, a reviewing court would have to exercise its independent judgment to declare that the agency's policymaking exceeded its statutory authority. *See Batterton*, 432 U.S. at 418 n.2 (providing that "[t]he term 'dependent child' shall . . . include a needy child . . . who has been deprived of parental support or care by reason of the unemployment . . . of his father . . . . (quoting 42

U.S.C. § 607 (1977))). The Supreme Court said as much in *Batterton*: "Of course, the Secretary's statutory authority to prescribe standards is not unlimited. He could not, for example, adopt a regulation that bears no relationship to any recognized concept of unemployment or that would defeat the purpose of the AFDC-UF program." *Id.* at 428.

The same is true with respect to policymaking delegations based on general rulemaking authority. Applying the traditional tools of statutory interpretation, courts must ensure that agencies use their general rule-making authority to truly fill up minor implementation details in their statutory scheme and that such interstitial gap-filling is permissible under "the particular statutory language at issue, as well as the language and design of the statute as a whole." *Kmart*, 486 U.S. at 291.

When it comes to flexible statutory terms or phrases, the reviewing court must exercise its independent judgment to ensure that the agency "regulate[s] subject to the limits imposed by a term or phrase." *Loper Bright*, 603 U.S. at 395. The *Loper Bright* Court's invocation of *Michigan v. EPA* is instructive. *See id.* In *Michigan v. EPA*, the Supreme Court reviewed a statutory delegation that commanded the "EPA to add power plants to [a regulatory] program if (but only if) the Agency finds

regulation 'appropriate and necessary.'" 576 U.S. at 752 (quoting 42 U.S.C. § 7412(n)(1)(A)). The Court concluded that the term "appropriate" is capacious and "leaves agencies with flexibility," but that "an agency may not 'entirely fai[l] to consider an important aspect of the problem' when deciding whether regulation is appropriate." *Id.* (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The Court held that, "[r]ead naturally in the present context, the phrase 'appropriate and necessary' requires at least some attention to cost." *Id.* It was thus "unreasonable for EPA to read § 7412(n)(1)(A) to mean that cost is irrelevant to the initial decision to regulate power plants." *Id.* at 759.

B. The Constitution Requires Courts To Rein In Excessive Statutory Delegations.

In *Loper Bright*, when discussing the possibility of congressional delegation of discretion to federal agencies, the Supreme Court repeatedly stated that courts should ensure that such delegations are "subject to constitutional limits." *Id.* at 395; *accord id.* at 404 (same); *id* at. 413 ("consistent with constitutional limits"); *see also* 5 U.S.C. § 706(2)(B) (requiring a reviewing court under the APA to set aside an agency action if it is "contrary to constitutional right, power, privilege, or immunity").

That means courts must assess whether, among other things, the statute delegating policymaking discretion to the agency complies with the non-delegation doctrine.

The nondelegation doctrine commands that Congress cannot delegate its legislative power to another entity. Accordingly, the Supreme Court has held that, when Congress delegates policymaking authority to federal agencies, "Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). Over the decades, this "intelligible principle" test has provided little-to-no constraint on delegation. As the Supreme Court has observed, "[i]n the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 473 (2001).

In recent years, however, a majority of the current Supreme Court has expressed some interest in reinvigorating the doctrine. *See Gundy*, 588 U.S. at 164–66 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) (arguing for a more exacting approach than the intelligible principle test); *id.* at 149 (Alito, J., dissenting) (expressing willingness "to

reconsider the [nondelegation] approach [the Supreme Court] has taken for the past 84 years"); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) ("Like Justice Rehnquist's opinion 40 years ago, Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.").

It may only be a matter of time until the Supreme Court takes that doctrinal step. Indeed, this Term, the Court heard argument in *FCC v. Consumers' Research* (No. 24–354), which involves a nationwide program that the Fifth Circuit found unconstitutional in part because it raised "grave" nondelegation concerns. *Consumers' Research v. FCC*, 109 F.4th 743 (5th Cir. 2024) (en banc). In that case, the Chamber filed an *amicus curiae* brief in support of neither party, urging the Court to adopt a proportional approach to the nondelegation doctrine:

> Under a proper conception of the doctrine, Congress may assign modest administrative tasks to an agency with little or no guidance. Once the authority granted to an agency becomes more significant, however, Congress must provide more specificity by supplying both an object and a route to guide the agency's discretion. And when it comes to the most important policy questions, Congress cannot delegate the hard choices to the agency at all, and instead must answer those questions itself—a constraint that complements the existing major-questions doctrine.

U.S. Chamber *Amicus* Br. 2, *FCC v. Consumers' Research* (S. Ct., filed Jan. 16, 2025), https://www.uschamber.com/cases/administrative-law-and-government-litigation/fcc-v-consumers-research.

Although the nondelegation doctrine itself has not been used to invalidate a congressional delegation since 1935, courts have recognized a number of canons of statutory interpretation—"nondelegation canons"—that construe statutes more narrowly to avoid nondelegation concerns. *See generally* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000). The major questions doctrine may be considered the most recent variant of a nondelegation canon. *See, e.g.*, *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (articulating a presumption, based on "both separation of powers and a practical understanding of legislative intent," that federal agencies do not have the authority to regulate major policy questions without clear congressional authorization); *id.* at 735 (Gorsuch, J., concurring) (arguing that the major questions doctrine "operates to protect foundational constitutional guarantees," including the nondelegation doctrine); *cf. Biden v. Nebraska*, 600 U.S. 477, 508 (2023) (Barrett, J., concurring) (arguing that the major questions doctrine is not a substantive canon aimed at avoiding nondelegation concerns but instead a

textualist "tool for discerning—not departing from—the text's most natural interpretation").

C. The APA Requires Courts To Ensure That Agencies Have Engaged In Reasoned Decisionmaking.

As *Loper Bright* underscores, reviewing courts must also "ensure that agencies exercise their discretion consistent with the APA." 603 U.S. at 404. When it comes to agency policymaking, the APA commands that courts must set aside an agency action if, among other things, it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The Supreme Court has explained that, to survive arbitrary-and-capricious review, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (1983) (internal quotation marks omitted). Articulating what has been coined the APA's reasoned decisionmaking requirement, the *State Farm* Court provided further instruction:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so

> implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given."

Id. (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*); *see also Loper Bright*, 603 U.S. at 395 (discussing the "reasoned decisionmaking" requirement and citing, inter alia, *State Farm*).

The Supreme Court's decision last Term in *Ohio v. EPA*, 603 U.S. 279 (2024), illustrates several of these aspects of arbitrary-and-capricious review.[2] In that case, the EPA disapproved more than 20 states' Clean Air Act implementation plans and then imposed one federal plan covering all of the disapproved states. *See id.* at 285. During the public comment period, commenters raised concerns about the EPA's proposed rule and underlying scientific modeling because both assumed that all disapproved states would in fact be covered by the federal plan even though

[2] In *Ohio v. EPA*, the Court applied the "arbitrary and capricious" standard of the Clean Air Act—not that of the APA—but it treated those standards as interchangeable, citing and applying the key APA reasoned-decisionmaking precedents. *See Ohio v. EPA*, 603 U.S. at 292; *see also U.S. Sugar Corp. v. EPA*, 113 F.4th 984, 991 n.7 (D.C. Cir. 2024) (noting that "judicial review under the Clean Air Act is 'essentially the same' as judicial review under the APA" (quoting *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1064 (D.C. Cir. 1995))).

that was far from certain, given legal flaws in the underlying EPA decisions disapproving the state plans. The EPA did not provide a reasoned response to the substance of those comments. *See id.* at 288–89, 293–94.

In granting a stay of the rule, the Supreme Court concluded that the challengers were likely to prevail on their arbitrary-and-capricious claim. The Court explained that the EPA had likely failed to engage in reasoned decisionmaking by not "supply[ing] 'a satisfactory explanation for its action'" and by "ignor[ing] 'an important aspect of the problem' before it." *Id.* at 294 (quoting *State Farm*, 463 U.S. at 43).

Earlier this Term, the Supreme Court also reiterated that agency policy changes raise distinctive arbitrary-and-capricious concerns under the APA. Conceptualizing a "change-in-position doctrine" from its existing case law on the subject, the Court reaffirmed that "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change," "'display awareness that [they are] changing position,'" and consider "'serious reliance interests.'" *FDA v. Wages & White Lion Invs.*, 145 S. Ct. 898, 917 (2025) (quoting *Encino Motorcars v. Navarro*, 579 U.S. 211, 221–222 (2016), in turn quoting *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009)).

The change-in-position doctrine does not always require agencies to "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Encino Motorcars*, 579 U.S. at 221 (quoting *Fox*, 556 U.S. at 515). But the Supreme Court has recognized two instances when a "more substantial justification" for a new position *is* warranted: (1) when the agency's "'new policy rests upon factual findings that contradict those which underlay its prior policy,'" and (2) when the agency's "'prior policy has engendered serious reliance interests that must be taken into account.'" *Perez v. Mort. Bankers Ass'n*, 575 U.S. 92, 106 (2015) (quoting *Fox*, 556 U.S. at 515). In these circumstances, the agency cannot merely acknowledge its change in position and explain its new stance. Rather, it must provide a meaningful account of why and how its assessment of the facts has changed—and why it believes the new policy's benefits outweigh the reliance interests of regulated parties.

IV. This Court Should Exercise Its Independent Judgment To Determine The Best Meaning Of The Statutory Phrase "Officially Ordered Or Approved."

In its order for supplemental briefing, this Court asked how "officially ordered or approved" in 5 U.S.C. § 5542(a) should be interpreted after *Loper Bright*. The answer is straightforward: If this Court decides

to discard or distinguish its prior precedent on the meaning of "officially ordered or approved," it must exercise its independent judgment to arrive at "the best reading" of the statute. *Loper Bright*, 603 U.S. at 400.[3] As detailed in Part I *supra*, this involves "us[ing] every tool at [this Court's] disposal to determine the best reading of the statute and resolve the ambiguity." *Id.* That toolkit consists of all of the traditional tools of statutory interpretation, including the text, structure, and design of the statute as well as the various interpretive canons. That also includes giving "due respect for the views of the Executive Branch," *Loper Bright*, 603 U.S. at 403, based on "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." *Skidmore*, 323 U.S. at 140.

Importantly, this case does not implicate any of three exceptions the *Loper Bright* Court identified for policymaking discretion.

[3] *Amicus* focuses on the framework the Court should use after *Loper Bright* to address the statutory question at issue in this case. It does not take a position on the best meaning of "officially ordered or approved" or on whether the Federal Circuit should reconsider any judicial precedent on that question. *See Loper Bright*, 603 U.S. at 412.

1. Specific Definitional Authority. In enacting 5 U.S.C. § 5542(a), Congress did not "expressly delegate to [OPM] the authority to give meaning to [the] particular statutory term" "officially ordered or approved." *Loper Bright*, 603 U.S. at 394–95 (cleaned up). The statutory text reads in relevant part: "For full-time, part-time and intermittent tours of duty, hours of work *officially ordered or approved* in excess of 40 hours in an administrative workweek . . . are overtime work and shall be paid for, except as otherwise provided by this subchapter, at the following rates . . . ." 5 U.S.C. § 5542(a) (emphasis added).

As detailed in Part II.A *supra*, for this to be a specific delegation to give meaning to a statutory term, Congress would have needed to include in this statutory section a command that the phrase "officially ordered or approved" shall be defined by OPM. *See Loper Bright*, 603 U.S. at 394–95 & n.5; *see also Batterton*, 432 U.S. at 418 n.2 ("as determined in accordance with standards prescribed by the Secretary" (quoting 42 U.S.C. § 607(a) (1977))); 29 U.S.C. § 213(a)(15) ("as such terms are defined and delimited by regulations of the Secretary"); 42 U.S.C. § 5846(a)(2) ("as defined by regulations which the Commission shall promulgate").

Nor does it appear that Congress has elsewhere specifically delegated to OPM the authority to give meaning to "officially ordered or approved." The two statutory provisions this Court flags in its supplemental briefing order do not constitute such specific delegations. The first provision, 5 U.S.C. § 5548, is a general rulemaking provision that allows—and in some cases requires—OPM to "prescribe regulations, subject to the approval of the President, necessary for the administration of this subchapter." Such a general rulemaking provision is necessary for an agency to have a delegation of policymaking discretion to fill up the details in a statutory scheme or to regulate subject to the limits of a flexible term. But *Loper Bright* makes clear that Congress must specifically charge the agency to define, or give meaning to, the statutory phrase "officially ordered or approved" before a court may conclude that the agency has this kind of authority. Section 5548 does no such thing.

The same is true of the second statutory provision this Court identifies, 5 U.S.C. § 1104. Section § 1104 requires OPM to "establish standards which shall apply *to the activities of the Office*." *Id.* (emphasis added). This standards-setting provision in no way expressly authorizes OPM *to define "officially ordered or approved*," as *Loper Bright* requires

as a precondition for such a specific delegation. Instead, it simply authorizes OPM to prescribe standards to fill up the details, subject to a reviewing court's independent judgment on whether such standards are lawful.

2. Fill Up the Details. While OPM has authority under both of these statutes to fill up certain details in the regulatory scheme, defining the statutory phrase "officially ordered or approved" does not fall within the *Loper Bright* "fill up the details" category. As detailed in Part II.B.1 *supra*, "fill up the details" delegation involves filling interstitial gaps. It does not concern fixing the meaning of particular terms in a statute. Congress knows how to specifically delegate such definitional authority to an agency. And the Supreme Court made clear in *Loper Bright* that Congress had to do so explicitly in order to assign that task to the agency rather than a reviewing court.

This remains true even if the phrase is susceptible to more than one meaning. If this Court were to hold that giving meaning to ambiguous statutory terms amounts to "filling up the details," it would be reinventing *Chevron* deference under a different name. That would conflict with the Supreme Court's holding in *Loper Bright* that "*Chevron* is overruled" and that "courts need not and under the APA may not defer to an agency

interpretation of the law simply because a statute is ambiguous." 603 U.S. 412–13.

3. Flexible Terms. The phrase "officially ordered or approved" is not the type of capacious statutory phrase that *Loper Bright* recognized as "leav[ing] agencies with flexibility." 603 U.S. at 395 (quoting *Michigan v. EPA*, 576 U.S. at 752). This is not an open-ended term like "appropriate" or "reasonable." *See id.* at 395 & n.6; *cf. Michigan v. EPA*, 576 U.S. at 752. If flexibility were triggered whenever a statutory term or phrase were susceptible to multiple meanings—i.e., when there is an ambiguity—that too would resurrect *Chevron* deference.

Instead, "officially ordered or approved" in 5 U.S.C. § 5542(a) is the type of statutory language that is subject to ordinary statutory interpretation. Courts are fully equipped to exercise their independent judgment to arrive at the best meaning of this statutory phrase, after exhausting all of the traditional tools of statutory interpretation. That is what *Loper Bright* requires of this Court here.

CONCLUSION

For these reasons, if the Court reaches the statutory interpretation question, it should exercise its independent judgment to determine the best meaning of the statutory phrase at issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Fed. R. App. P. 32(g)(1) and Fed Cir. R. 32(b)(3) that the foregoing brief has been prepared using proportionally-spaced typeface and includes 6,612 words according to the Microsoft Word count function, excluding those materials not required to be included under Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2025, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel for all parties who have registered for receipt of documents filed in this matter.

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