IN THE UNITED STATES TAX COURT

GARY M. SCHWARZ & MARLEE SCHWARZ, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	No. 12347–20

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

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (Chamber) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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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 November 5, 2024, 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 the breadth of its membership and its long history of challenging and defending regulations, 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 *Amicus* Br., *LHL Realty Co. v. District of Columbia*, No. 22–

[*] Pursuant to Tax Court Rule 151.1(c)(3), *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.

TX–820 (D.C. Ct. App., filed July 1, 2025); U.S. Chamber *Amicus* Br., *Lesko v. United States*, No. 23–1823 (Fed. Cir., filed May 29, 2025); U.S. Chamber *Amicus* Br., *Coca-Cola Co. v. Comm'r*, No. 24–13470 (11th Cir., filed Mar. 18, 2025); 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., *Florida E. Coast Railway v. FRA*, No. 24–11076 (11th Cir., filed Aug. 2, 2024).

SUMMARY OF ARGUMENT

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 has 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 delegation, and that the agency's policymaking complies with the reasoned-decisionmaking requirements of the Administrative Procedure Act (APA).

In terms of how this Court should interpret the statutory phrase "activity not engaged in for profit" in Internal Revenue Code (I.R.C.) § 183, 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 what constitutes "an activity not engaged in for profit" is a matter of ordinary statutory interpretation that requires this Court to exercise its independent judgment under *Loper Bright*.

[1] *Amicus* takes no position on the meaning of the specific statutory terms. Nor does *amicus* take a position on any potentially binding precedent at issue in this case regarding that question.

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 with the elimination of *Chevron* deference in *Loper Bright*. Judicial review now requires courts to "exercise their independent judgment in 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 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 engage in an ordinary statutory interpretation: 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"—not controlling deference—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 (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 best reading of 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 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 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 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 Court explained, "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 has 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 May Be Authorized To Fill Up Details And Regulate Subject To The Limits Of Flexible Terms.

The fact that general rulemaking provisions do not authorize agencies 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"); I.R.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—after looking at the structure and design of the statutory scheme as a whole—that the best interpretation of the statute authorizes the agency to fill up certain 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 authorizing agencies to fill 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 the phrase "appropriate and necessary" means.

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

If a 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 a reviewing court 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 assertion 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 Professor 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 rulemaking 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. *Loper Bright*'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 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 nondelegation 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). Just a few weeks ago in *FCC v. Consumers' Research*, No. 24–354, 2025 WL 1773630 (U.S. June 27, 2025), the Supreme Court applied the intelligible principle test and reaffirmed two important points. First, inherent in the

intelligible principle test is a principle of proportionality. "The 'guidance' needed is greater," the Court explained, "when an agency action will 'affect the entire national economy' than when it addresses a narrow, technical issue." *Id.* at *8 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001)). Second, when assessing statutory delegations, courts must ensure that the statute expresses a "'general policy'" the agency must pursue, as well as the "'boundaries'" it cannot cross. *Id.* (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). Those boundaries can come in quantitative or qualitative terms. But they must be discernible, such that "'the courts and the public [can] ascertain whether the agency' has followed the law." *Id.* (quoting *OPP Cotton Mills, Inc. v. Administrator of Wage & Hour Div., Dep't of Labor*, 312 U.S. 126, 144 (1941)).

In addition to the nondelegation doctrine, courts have recognized several 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 the most recent variant of such a 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 agencies cannot regulate major policy questions without clear congressional authorization). Indeed, in *FCC v. Consumers' Research*, Justice Kavanaugh observed that "many of the broader

structural concerns about expansive delegations have been substantially mitigated by this Court's recent case law in related areas—in particular (i) the Court's rejection of so-called *Chevron* deference and (ii) the Court's application of the major questions canon of statutory interpretation." 2025 WL 1773630, at *22 (Kavanaugh, J., concurring); *accord id.* at *41 (Gorsuch, J., dissenting) ("To its credit, the Court has sometimes mitigated its failure to police legislative delegations by deploying other tools, like the major questions doctrine and *de novo* review of statutory terms . . . .").

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*).

Last Term, the Supreme Court 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 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 I.R.C. § 183.

In its order for supplemental briefing, this Court asked how I.R.C. § 183 should be interpreted after *Loper Bright*. The answer is straightforward: if there is no binding precedent on point—or if this Court decides to discard or distinguish any such precedent—the Court must exercise its independent judgment to arrive at "the best reading" of the term "activity" and the phrase "activity not engaged in for profit" in I.R.C. § 183. *Loper Bright*, 603 U.S. at 400.[2]

[2] *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 the statute or on whether this Court should or must reconsider any judicial precedent on that question. *See Loper Bright*, 603 U.S. at 412.

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." *Loper Bright*, 603 U.S. at 400. 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," *id.* 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.

1. Specific Definitional Authority. In enacting I.R.C. § 183, Congress did not "expressly delegate to [Treasury] the authority to give meaning to [the] particular statutory" phrase "activity not engaged in for profit." *Loper Bright*, 603 U.S. at 394–95 (cleaned up).[3] As detailed in Part II.A *supra*, for this to be a specific delegation to give meaning to statutory language, Congress would have needed to include in this statutory section a command that the phrase "activity not engaged in for profit"

[3] *Amicus* uses "Treasury" as a shorthand to include the Internal Revenue Service and the Department of Treasury as well as the Commissioner of Internal Revenue and the Secretary of Treasury.

shall be defined by Treasury. *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 Treasury the authority to give meaning to "activity not engaged in for profit." The statutory provision this Court flags in its supplemental briefing order does not constitute such specific delegation. I.R.C. § 7805(a) is a general rulemaking provision that authorizes Treasury to "prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." Such a general rulemaking provision is necessary for an agency 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 "activity not engaged in for profit" before a court may conclude that the agency has this kind of authority. I.R.C. § 7805(a) does no such thing.

2. Fill Up the Details. While Treasury may have authority under I.R.C. § 7805(a) to fill up *certain* details in the regulatory scheme, defining the statutory

phrase "activity not engaged in for profit" does not fall within the *Loper Bright* "fill up the details" category.[4] 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 Court made clear in *Loper Bright* that Congress has 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 terms amounts to "filling up the details," it would reinvent *Chevron* deference under a different name. That would conflict with the 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. at 412–13.

[4] *Amicus* agrees with Petitioners that a general rulemaking provision might not always be sufficient to authorize an agency to "fill up the details" of the relevant statute. *See* Pet'rs. Supp. Br. 12–17. Courts should be cautious to recognize "gap-filling" discretion based on general rulemaking provisions without examining the structure and design of the statutory scheme as a whole. Petitioners make a compelling case that Congress is particularly explicit when it authorizes "gap-filling" in the Internal Revenue Code by often including specific standards-setting provisions. *See id.* at 15 (citing I.R.C. §§ 180(c), 817A(e), 1472(b), 1502, 4104, 5291, 5418, 5842, 6202, 6050T, and 6803). This Court need not reach that issue, as statutory terms like "activity" and phrases like "activity not engaged in for profit" leave no room for gap-filling. Instead, they are subject to ordinary statutory interpretation.

3. Flexible Terms. The phrase "activity not engaged in for profit" 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, the term "activity" and the phrase "activity not engaged in for profit" in I.R.C. § 183 are 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 term and 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 language at issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I sent the original and one copy of this *amicus curiae* brief to the Court via FedEx Priority Overnight, accompanied by a motion for leave to file. I further certify that the parties in this case have consented in writing to service via electronic delivery and that they were served with this brief at the following email addresses on the date indicated below:

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