"The Future is *Loper Bright*: Congress's Role in the Regulatory Landscape"

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Chairman Lankford, Ranking Member Fetterman, and Distinguished Members of the Subcommittee:

Thank you for inviting me here to discuss how Congress can respond to the Supreme Court's opinion in *Loper Bright*.[1] My name is Chad Squitieri. I am an Assistant Professor of Law at the Catholic University of America's Columbus School of Law, where I focus on administrative law and the constitutional separation of powers. In connection with my work as a law professor, I serve as the Director of the Separation of Powers Institute and as a Managing Director of the Center for the Constitution and the Catholic Intellectual Tradition.[2]

The Supreme Court's decision in *Loper Bright* brought about a welcome change to administrative law. Under the old *Chevron* regime,[3] courts would often adopt a less-than-best reading of a statute because that reading was offered by an administrative agency. This required courts to favor one class of litigants (*i.e.*, federal agencies) over other types of litigants—such as private citizens who alleged that their government had acted unlawfully. This state of affairs was inappropriate because federal judges should not give undue preference to any litigant that comes before them—including federal agencies.

But while *Loper Bright* played an important role in beginning to level the field on which private citizens and federal agencies litigate, I wish today to step back, take a wider look at things, and suggest that *Loper Bright* was in some sense small potatoes. My hope is that by situating *Loper Bright* within the broader framework of administrative law, this subcommittee can better use *Loper Bright's* momentum to make progress on a variety of administrative law topics that *Loper Bright* relates to, but did not formally address.

To speak briefly and in general terms, a good bit of agency decision making can be categorized into three buckets: (i) findings of fact, (ii) policy decisions, and (iii) conclusions of law. Courts review those different decisions through different standards of review. And *Loper Bright* only addressed how courts review agency decisions that fall within the third bucket (*i.e.*, conclusions of law). More specially, *Loper*

[1] Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024).
[2] I offer this written testimony, and my intended oral testimony, in my personal capacity. Institutional affiliations are provided for identification and biographical purposes.
[3] *See* Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984).

Bright only addressed one type of conclusion of law—namely, conclusions of law relating to statutory interpretation. *Loper Bright* did not purport to change how courts review agency conclusions of law relating to the interpretation of regulations. Nor did the decision purport to change anything about how courts review questions of fact or policy. To bring the point home: the Supreme Court recently ruled that, in a particular environmental context, "[c]ourts should afford substantial deference" to "fact-dependent, context-specific, and policy-laden choices" made by agencies.[4]

I highlight what *Loper Bright* did *not* do because Congress should consider picking up where *Loper Bright* left off. In particular, Congress should consider making three changes.

First, Congress should make clear that courts must not defer to agency conclusions of law when interpreting *regulatory* terms—similar to how *Loper Bright* already makes clear that courts must not defer to agency conclusions of law when interpreting *statutory* terms. Currently, courts must give *Kisor* deference to agency conclusions of law relating to interpreting regulations.[5] The name *Kisor* comes from a 2019 Supreme Court decision in which the Court was asked to overrule this form of deference. Although several justices in *Kisor* were prepared to overrule this form of deference, a slim majority decided to keep this form of deference due to *stare decisis*.

The legal rationale for keeping *Kisor* has been called into question by *Loper Bright*.[6] Congress can alleviate uncertainty by stating that *Kisor* deference, like *Chevron* deference, is no longer permitted. Congress could do this in a big way by amending the Administrative Procedure Act, which applies across the administrative state. Alternatively, Congress could do away with *Kisor* deference on a more tailored basis by amending specific statutes relating to specific agencies.

Second, Congress should both be conscious of when it grants policy discretion and consider cabining such discretion when appropriate. Courts typically review agency policy decisions under the arbitrary and capricious standard.[7] Under that standard "a court asks not whether it agrees with the agency decision, but rather only whether the agency action was reasonable and reasonably explained."[8] This is a generous standard of review from an agency's perspective—which makes sense, as courts should not be in the policymaking business. But *Congress* most certainly should be in the policymaking business. Thus, Congress should be conscious of when it is empowering agencies to exercise policy discretion on Congress's behalf, and Congress should consider cabining such discretion when appropriate.

As to when legislation grants policy discretion: courts might interpret legislation as granting such discretion when legislation uses terms like "appropriate" or "reasonable," and when legislation

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[4] Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colorado, 145 S. Ct. 1497, 1513 (2025).
[5] *See* Kisor v. Wilkie, 588 U.S. 558 (2019).
[6] *See* Chad Squitieri, Auer *after* Loper Bright*,* Yale J. Reg. Notice & Comment (Oct. 15, 2024), available at https://www.yalejreg.com/nc/auer-after-loper-bright-by-chad-squitieri/.
[7] *See Seven Cnty. Infrastructure Coal.,* 145 S. Ct. at 1511.
[8] *Id.*

expressly delegates to an agency the authority to give meaning to a particular statutory term.[9] As to how to cabin such discretion: Congress could make clear that agencies must consider certain factors when making policy judgments. For example, in the environmental context, Congress might require agencies to consider whether regulatory policy helps or hurts American industry. Statutorily required considerations can be thought of as speed bumps, or nudges. They will not *require* an agency to develop policy in one direction or another. But they can cause agencies to slow down, show their math, and exercise policy discretion in a way Congress prefers.

Third, Congress should make more policy decisions itself, rather than delegate substantial discretion to agencies. In a recent nondelegation decision, the Supreme Court more or less passed on an opportunity to give Congress some encouragement on this front.[10] The nondelegation doctrine enforces constitutional limits on Congress's ability to delegate to agencies. But Congress need not wait on the federal judiciary to begin reining in delegations. Congress can do so now, on its own initiative.

In conclusion, thank you for inviting me here to discuss how Congress can respond to the important, but nonetheless limited, change to administrative law brought about by *Loper Bright*.

[9] *See, e.g.*, *Loper Bright*, 603 U.S. at 394–95 nn.5–6.
[10] *See* Fed. Commc'ns Comm'n v. Consumers' Rsch., 145 S. Ct. 2482 (2025).