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OnPOINT

# The Supreme Court's New New Deal

## Its 2024 term reshaped administrative law and regulatory policy

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In the final weeks of its 2024 term, the Supreme Court of the United States issued several opinions that transform the nation's regulatory climate. The Court's opinions create fundamental changes in the way that federal regulatory agencies (both executive agencies and independent agencies) and Cabinet departments work and in the way that Congress will now supervise them. Indeed, these opinions have now opened the door to reforms that will allow Congress to do its fundamental job — the making of laws — more effectively and efficiently.

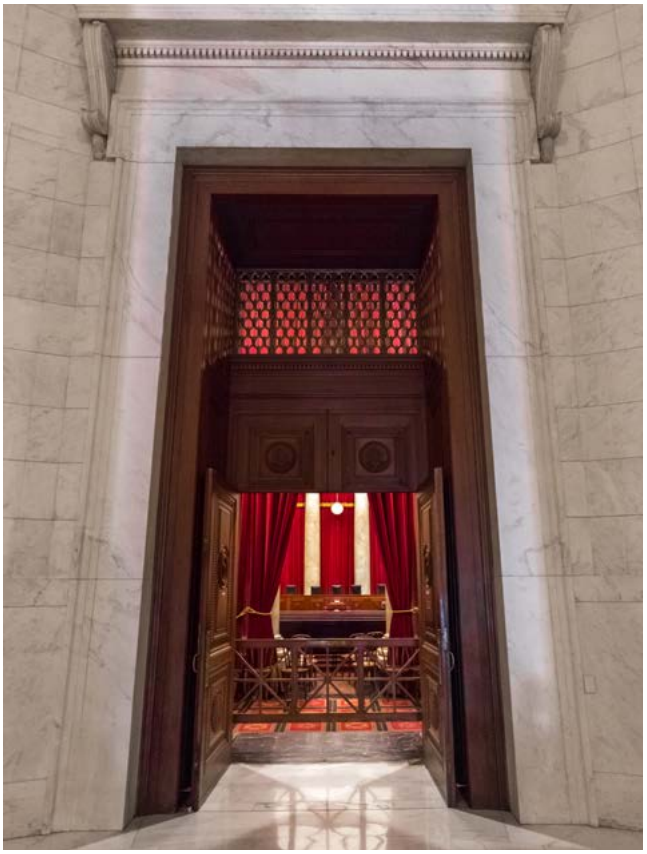
This report provides a brief account of the practical impact of recent Supreme Court opinions that affect regulatory agencies, administrative law, and regulatory policy generally. It also contains a brief discussion of the opportunities those opinions present to members of Congress and their staffs.

### *Loper Bright* returns interpretation to courts

In *Loper Bright Enterprises v. Raimondo,*[1] the Supreme Court discarded a rule of interpretation that had been in effect for several decades. That now-discarded rule addressed this question: When a regulatory agency's interpretation of a statute is challenged in court, how do we determine whether that interpretation should remain in force?

Since 1984, the rule had been: If the agency's interpretation of an ambiguous statute is reasonable, the court must uphold that agency's interpretation. (This was also known as the *Chevron* rule or the principle of *Chevron* deference.)[2] Under *Loper Bright,* however, there's a new rule of interpretation: from now on, it will be the role of courts, not agencies, to determine the correct interpretation of a statute — so when an agency's interpretation of some statute is challenged in court, the court is now the body that decides the best interpretation of that statute.[3]

Under *Loper Bright,* it is now "the responsibility of the court to decide whether the law means what the agency says."[4] There's one exception, however: previous judicial decisions and administrative findings arrived at through *Chevron* deference will not be overturned by *Loper Bright.*



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

2 *See generally Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984), and its progeny.

3 As the Court notes, the Administrative Procedure Act "specifies that courts, not agencies, will decide 'all relevant questions of law' arising on review of agency action." *Loper*, at 2247 (citing 5 U.S.C. § 706 of the Administrative Procedure Act).

4 *Id.* at 15.

The impacts of *Loper Bright* will be varied:

- When making decisions about statutory interpretation in the future, it remains likely that courts will still give some degree of deference or weight to the interpretive judgments of agency personnel. Although agency judgments are not controlling or authoritative, they "do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[5] Granting agency judgments some degree of weight in this manner is known as *Skidmore* deference: courts will likely continue to grant such deference to agencies in the future.
- *Loper Bright* may encourage agencies to avoid the pursuit of regulatory objectives through more formal avenues (such as rulemaking) and instead choose more informal avenues (such as guidance documents), because the interpretive discretion of agencies during rulemaking now appears diminished. Cheaper alternatives to rulemaking are likely now more attractive to agency bureaucrats.
- Although *Loper Bright* reduced the discretion of agencies to act on creative interpretations of the law, it doesn't affect the authority of agencies to conduct policymaking or rulemaking — as long as the rulemaking or policymaking actions of the agency are consistent with the interpretation that a court would make of the relevant statutory text. Indeed, large portions of present and future regulation are expressly authorized by existing legislation.
- The central impact of *Loper Bright* on agencies is probably to reduce their discretion in interpreting and implementing statutes. One beneficial consequence of this reduction should be a corresponding reduction in the way agency interpretations swing back and forth as administrations change. Another likely consequence is that agency heads and their lawyers are now likely to focus on whether their agency's actions are permitted (or compelled) by congressional delegation of discretionary authority, and whether the agency's exercise of that authority can be understood as the best interpretation of the legislative text. Whether the Supreme Court would respond to such behavior in future years by narrowing the scope of Congress's permissible delegation is an open question.
- The central impact of *Loper Bright* on Congress is probably to encourage its members to be more precise in the legislative text they produce — because agency interpretation of any given statute that appears to diverge from the text of that statute is now more likely to be struck down by courts in the future. Similarly, it is not unheard of for courts to produce unusual interpretations of statutory language, and so the precision that *Loper Bright* should encourage is likely to shrink the problem of free agency in the judiciary as well. On the other hand, even though *Loper Bright* seems to encourage legislative clarity, it is undeniable that there are occasional strategic advantages that Congress may exploit by passing legislation that is sometimes vague or unclear, and so it is ultimately in the hands of Congress just how responsibly or irresponsibly its members choose to behave.

The following chart, **The Consequences of *Loper Bright*: A Sampler**, provides a set of statutory clauses that assign duties and powers to independent agencies, as well as a set of predictions as to how courts would understand the meaning and operation of those clauses both before and after *Loper Bright*. Because agency actions are ultimately constrained by the statutory text and interpretation that governs them, this chart suggests that *Loper Bright* will have a broad, long-term impact on agency behavior.

- Very generally, agencies perform several different types of work. One type of work that agencies do is to make determinations and findings of fact; another type of work that agencies do is to carry out the instructions that statutes give them by (in part) interpreting the words and phrases in those statutes. *Loper Bright* didn't really change the nature of the first type of agency work, but it fundamentally altered the nature of the second type of agency work.
- The biggest impact of *Loper Bright* is that when the way an agency does its job is challenged in court, courts will no longer give conclusive weight to the way agencies interpret ambiguous words and phrases in statutes; instead, from now on courts will make independent judgments about the meaning of such words and phrases.
- However, *Loper Bright* didn't change any agency's authority to adopt rules. Nor did it change the way agencies arrive at determinations and findings of fact: both before and after *Loper Bright*, agencies must base their determinations and findings of fact on substantial evidence.

[5] *See generally Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and its progeny.

## The consequences of *Loper Bright:* A sampler

This chart demonstrates how various selected statutes affect the work of agencies, before and after *Loper Bright*.

| Statutory text | Before *Loper Bright* | After *Loper Bright* |
|---|---|---|
| A fishery management plan shall contain conservation and management measures which are "necessary and appropriate for the conservation and management of the fishery, to prevent overfishing and rebuild overfished stocks, and to protect, restore, and promote the long-term health and stability of the fishery."<br><br>16 U.S.C. § 1853. | **Implied authority:** The agency has implied authority to determine the meaning of ambiguous terms in the statute (for instance, the agency has the authority to determine what is "necessary and appropriate").†<br><br>**Express authority:** The agency has express authority to issue fishery management plans consistent with the statute's meaning. | **Implied authority:** None.<br><br>**Express authority:** The agency still has the express authority to issue fishery management plans that are consistent with the statute's meaning. However, in the event of a legal challenge to agency action, a court would determine the meaning of terms within the statutory text, such as "necessary and appropriate"; furthermore, that court could *probably* reject the agency rule if it found that the rule the agency issued was not consistent with that meaning.* |
| Minimum wage and maximum hour requirements shall not apply to "(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary... )."<br><br>29 U.S.C. § 213(a)(1). | **Implied authority:** None.<br><br>**Express authority:** The agency has express authority to determine the meaning of ambiguous terms in the statute.† | **Implied authority:** None.<br><br>**Express authority:** The agency has express authority to determine the meaning of ambiguous terms in the statute.†<br><br>(Notably, *Loper Bright* has not changed the agency's authority to apply and execute its rules.) |
| The Secretary "shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter."<br><br>42 U.S.C. § 1302 (Medicare and Medicaid rules) | **Implied authority:** The agency has implied authority to determine the meaning of ambiguous terms in the statute (for instance, the agency has the authority to determine what is "necessary" for "efficient administration").†<br><br>**Express authority:** The agency has express authority to issue rules that establish the facts that are necessary to enforce the statute. | **Implied authority:** None.<br><br>**Express authority:** The agency has express authority to issue rules that establish the facts that are necessary to enforce the statute. |
| "The Secretary shall promulgate regulations to define the dependents to which coverage shall be made available."<br><br>42 U.S.C. 300gg–14 (Extension of dependent coverage) | **Implied authority:** The agency has implied authority to determine the meaning of ambiguous terms in the statute (for instance, the agency has the authority to determine what a "dependent" is).†<br><br>**Express authority:** The agency has express authority to issue rules that establish what scope of coverage for dependents is required. | **Implied authority:** None.<br><br>**Express authority:** The agency still has express authority to issue rules that establish what scope of coverage is required. However, in the event of a legal challenge to agency action, a court would determine the meaning of the statutory text (for instance, the court has the authority to determine what a "dependent" is); furthermore, that court could *probably* reject the agency rule if it found that the rule the agency issued was not consistent with the meaning determined by the court.* |
| "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property."<br><br>5 U.S.C. § 301 (Departmental regulations) | **Implied authority:** None.<br><br>**Express authority:** The agency has express authority to issue rules that govern its employees and the use of its property. | **Implied authority:** None.<br><br>**Express authority:** The agency has express authority to issue rules that govern its employees and the use of its property.<br><br>(Notably, *Loper Bright* has not changed the agency's authority to apply and execute its rules.) |

† It is worth noting that, before *Loper Bright*, an agency's authority to determine the meaning of ambiguous statutory terms was limited: the use of that interpretive authority was confined to reasonable or permissible interpretations.

* A court could probably reject an agency rule in such circumstances because it would probably find that the circumstances at hand presented a mixed question of law and fact. In such cases, the court would probably find that the statute's meaning (as determined by the judge) was inconsistent with the facts of the matter (as determined by the agency). However, if a court found that the circumstances at hand involved only questions of fact (and not questions of law), then presumably that court would not reject the agency rule—unless the agency lacked substantial evidence to support its claims of fact.

| Statutory text | Before *Loper Bright* | After *Loper Bright* |
|---|---|---|
| "The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing—minimum standards required in the interest of safety for appliances and for the design, material, construction, quality of work, cybersecurity, and performance of aircraft, aircraft engines, and propellers"<br><br>49 U.S.C. § 44701 (Safety Regulation). | **Implied authority:** The agency has implied authority to determine the meaning of ambiguous terms in the statute (for instance, the agency has the authority to determine what a "minimum standard" is, what a "design" is, etc.).†<br><br>**Express authority:** The agency has express authority to issue rules establishing minimum safety standards—as well as rules that establish the facts that are necessary to enforce the statute. | **Implied authority:** None.<br><br>**Express authority:** The agency still has express authority to issue rules establishing minimum safety standards—as well as rules that establish the facts that are necessary to enforce the statute. However, in the event of a legal challenge to agency action, a court would determine the meaning of the statutory text (for instance, the court would determine the meaning of a "minimum standard"); furthermore, that court could *probably* reject the agency rule if it found that the rule the agency issued was not consistent with the meaning determined by the court.* |
| "The Administrator shall periodically review the list established by this subsection and publish the results thereof and, where appropriate, revise such list by rule, adding pollutants which present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects (including, but not limited to, substances which are known to be, or may reasonably be anticipated to be, carcinogenic, mutagenic, teratogenic, neurotoxic, which cause reproductive dysfunction, or which are acutely or chronically toxic) or adverse environmental effects whether through ambient concentrations, bioaccumulation, deposition, or otherwise, but not including releases subject to regulation under subsection (r) as a result of emissions to the air."<br><br>42 U.S.C. § 7412 (Hazardous air pollutants). | **Implied authority:** The agency has implied authority to determine the meaning of ambiguous terms in the statute (for instance, the agency has the authority to determine the meaning of "adverse human health effects" or "adverse environmental effects").†<br><br>**Express authority:** The agency has express authority to issue rules that designate what pollutants create a threat of adverse effects—and the facts that are necessary to determine whether such pollutants create that threat. | **Implied authority:** None.<br><br>**Express authority:** The agency still has express authority to issue rules that designate what pollutants create a threat of adverse effects—and the facts that are necessary to determine whether such pollutants create that threat. However, in the event of a legal challenge to agency action, a court would determine the meaning of the statutory text (for instance, the court would determine the meaning of "adverse human health effects" and/or "adverse environmental effects"), furthermore, that court could *probably* reject the agency rule if it found that the rule the agency issued was not consistent with the meaning determined by the court.* |
| "The Administrator shall develop, promulgate, and revise as may be appropriate, regulations designating as hazardous substances, other than oil as defined in this section, such elements and compounds which, when discharged in any quantity into or upon the navigable waters of the United States... which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States... present an imminent and substantial danger to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, shorelines, and beaches." 33 U.S.C. § 1321(b)(2) (Oil and hazardous substance liability). | **Implied authority:** The agency has implied authority to determine the meaning of ambiguous terms in the statute (for instance, the agency has the authority to determine the meaning of a "danger to public health or welfare").†<br><br>**Express authority:** The agency has express authority to issue rules that designate what substances are hazardous, when or if they create a danger to public health or welfare, and what facts are needed to establish that such substances are hazardous and that they create such a danger. | **Implied authority:** None.<br><br>**Express authority:** The agency still has express authority to issue rules that designate what substances are hazardous, when or if they create a danger to public health or welfare, and what facts are needed to establish that such substances are hazardous and that they create such a danger. However, in the event of a legal challenge to agency action, a court would determine the meaning of the statutory text (for instance, the court would determine the meaning of a "danger to public health or welfare"); furthermore, that court could *probably* reject the agency rule if it found that the rule the agency issued was not consistent with the meaning determined by the court.* |

## *Jarkesy* protects right to jury trial

In *Securities and Exchange Commission v. Jarkesy*,[6] the Supreme Court prohibited agencies from seeking civil penalties for wrongful conduct via administrative hearing. The reason for this is that, in such cases, the defendant has not been afforded his or her right to a jury trial.

The Court reasoned that when defendants are put on trial before agency tribunals for wrongful conduct that resembles the commission of common-law offenses such as fraud, those defendants have been unconstitutionally denied their Seventh Amendment rights if they are denied the protections of a jury trial. Notably, the scope of this decision extends only to the levying of monetary penalties that are intended to punish, not decisions by the administrative tribunal that are intended to effect restitution to victims.

## *CFPB* insulates a few agencies

In *Consumer Financial Protection Bureau v. Community Financial Services Ass'n of America*,[7] the Supreme Court found that the unusual funding mechanism of the Consumer Financial Protection Bureau (CFPB) is constitutionally permissible. Unlike most agencies, which must seek funding through Congress's appropriations process, the CFPB receives funding directly from the Federal Reserve. Although Congress typically uses the power of the purse to monitor and constrain agencies, the necessary implication of the Court's *CFPB* decision is that congressional oversight power therefore cannot be exercised over the CFPB in the way that Congress conventionally oversees other agencies.

The Court held that funds coming from a statutorily identified source are properly "drawn from the Treasury … in Consequence of Appropriations made by Law,"[8] which means that CFPB funding passes the Constitution's relevant test. As critics of this decision have noted, *CFPB's* reading of the Appropriations Clause allows congressional creation of more agencies that are essentially unaccountable to Congress through conventional means (that is, by means of Congress's budget process) and almost completely unaccountable to the public and thus immune from any genuine external control.

## *NetChoice* cases protect platforms' free speech

*Moody v. NetChoice, LLC* and *NetChoice v. Paxton*[9] are the Supreme Court's response to two states' attempts to govern the operations of social media services such as Facebook, YouTube, and Twitter. These services regularly moderate the content that they provide, and Texas and Florida policymakers responded with state laws to control the behavior of the private-sector moderators.

The Court declined to issue a definitive opinion about the constitutionality of these two particular state laws. Instead, it sent the cases back down to lower courts and instructed those courts to analyze the state laws at issue according to the principles it supplied. The two principles of greatest relevance here are that: (1) The First Amendment protects expressive activity, and expressive activity includes "compiling and curating others' speech," which means that government interference with the editorial choices of such entities as newspaper editors, social media moderators, and parade directors is likely to run afoul of the Constitution; and (2) in this context, the First Amendment likely blocks government efforts to improve, redistribute, or rebalance the flow of information in the marketplace of ideas. Thus, government mandates that are designed to require editors and curators to provide platforms for views they wish to spurn are likely unconstitutional.

However, as the Court noted, its opinion focuses primarily on the relevance of the First Amendment to the main feed of user-generated content that services like Facebook provide. In contrast, the opinion essentially avoids discussing how or whether government regulation of other services provided by social media sites (for instance, regulation of a Facebook user's "home page" or use of an electronic message service) conflicts with the First Amendment.

## The Court dodges 'jawboning'

In two cases this term, the Supreme Court wrestled with how best to understand "jawboning" — which is generally the label used for the improper use of informal government pressure against private parties. "Jawboning" is a notoriously vague concept that does not necessarily require coercion: it might consist of criticism by the government, encouragement from the government, or even "entanglement" with the government. What is and isn't jawboning is far from a black-and-white issue. Some government actions are undeniably jawboning, some undeniably are not, and there is a significant gray area of government action in which it is unclear whether some government action is appropriately understood as jawboning.

6 *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024)

7 *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 144 S. Ct. 1474 (2024)

8 U.S. Const. Art. I § 9, cl. 7.

9 *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024)

In *Murthy v. Missouri,*[10] the plaintiffs argued that the federal government was unconstitutionally pressuring social media services to eliminate user-created posts about various controversial matters (COVID, elections, etc.). The Court never really addressed the merits of those arguments. Instead, it determined that the plaintiffs had failed to establish necessary elements of their case. For instance, the opinion argued that the plaintiffs' case lacked the standing to be heard because (for instance) the parties hadn't shown that their speech was restricted because of government pressure (as opposed to being restricted by the platforms' decisions).

There is a sharp contrast between *Murthy* and *National Rifle Association of America v. Vullo.*[11] In *Vullo,* the Court determined that when a public official pressured private parties to stop doing business with the NRA, this could reasonably be understood as the exercise of state power that discouraged the NRA's right of free expression. Maria Vullo — the former superintendent of New York State's insurance regulators — had allegedly told at least one insurance company subject to her regulatory authority that, unless it stopped doing business with the NRA, she intended to focus on prosecuting its technical infractions. Because such communications "can be reasonably understood as a threat or as an inducement," the Court held that the NRA had sufficiently demonstrated the possibility of a First Amendment violation.

The Court never used the word "jawboning" in either one of these opinions. Nonetheless, it seems reasonable to conclude that these two opinions reflect the Court's desire to avoid producing a theory about what jawboning is or isn't. In its defense, producing that theory could be a difficult task and the costs of making an error in this area could be very large. The Court doesn't want to prohibit the government from appropriately and responsibly exercising its duties. Nor does it want to signal openness to dangerous and destructive government actions.

In short, the prospects for success of defining — and then prohibiting — an inherently vague concept like "jawboning" are not promising. The only real consequence of opinions like *Vullo* is that they make extreme and obvious abuses of government authority marginally less likely to happen. As part of the next section below, which contains policy proposals that are intended to work with the new status quo that is created by the Court's decision this term, this report provides a policy response to "jawboning" that is likely to be less dangerous, more effective, and free from any elements of direct prohibition at all.

## *Corner Post* and your day in court

In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System,*[12] the Court ruled that a North Dakota truck stop could challenge a 13-year-old regulation from the Federal Reserve Board. The Corner Post truck stop had argued that the regulation misinterpreted the calculations for debit card fees that Congress laid out in statute. More broadly, the Court held that, for regulatory challenges under the Administrative Procedure Act, the clock for the statute of limitations starts ticking when the plaintiff is injured by agency action and not (as previously) when the rule is published.

This change in the law removes some barriers to litigants. The lower courts that heard the action had reasoned that the statute of limitations for the truck stop to sue the Board had expired in 2017, even though Corner Post had not opened for business until 2018.

As the opinion notes, there are at least two solid policy reasons for adjusting the statute of limitations so that the clock starts running only when the prospective plaintiff is injured by agency action: (1) the Administrative Procedure Act contains a "basic presumption" of judicial review, and (2) there is a "deep-rooted historic tradition that everyone has his own day in court."

The Court's three dissenters noted that expanding access to parties who are injured by regulations would increase court workloads and make rules easier to challenge. It seems fair to retort that protecting the rights of injured parties is ultimately the job that courts are supposed to be doing.

[10] *Murthy v. Missouri,* 144 S. Ct. 1972 (2024)

[11] *Nat'l Rifle Ass'n of Am. v. Vullo,* 602 U.S. 175, 144 S. Ct. 1316 (2024)

[12] *Corner Post, Inc. v. Bd. of Governors of Fed. Rerve Sys.,* 144 S. Ct. 2440 (2024)

## Policy recommendations

The new regulatory landscape created by these opinions implies that the Supreme Court is sending a message. That message is: We are doing our job, but Congress must do its job. For Congress to take responsibility as the policymaking branch of the federal government, Congress should take action on the following regulatory reforms:

- **Congress should amend the Administrative Procedure Act by eliminating the adjudicatory authority of federal agencies (aside from federal benefit adjudication) and absorbing administrative law judges into an expanded Article III judicial system.**[13] This would end a state of affairs in which defendants' constitutional rights are increasingly undermined — and about which multiple courts have signaled their discomfort. Although piecemeal administrative reforms in this area have achieved some progress, ultimately, the only way that this problem will be solved is through the passage of federal legislation that ensures that only impartial Article III judges exercise such adjudicatory powers.
- **Congress should put into place what CEI has called "Constitutional Restoration."**[14] In the long run, Congress should take additional measures to reassign all federal legislative powers to Congress and all federal judicial powers to Article III courts. Such measures would restore the constitutional design based on political accountability and self-government. The array of positive effects that constitutional restoration would create include encouraging Congress to make hard decisions rather than delegating such decisions to unaccountable bureaucrats.
- **Congress should pass the Guidance Out of Darkness (GOOD) Act**[15] **to address the proliferation of "regulatory dark matter" that regularly circumvents the traditional notice-and-comment rulemaking process.**[16] Agencies now issue thousands of guidance documents, interpretative rules, and policy statements without the transparency afforded by the Federal Register. While these documents are technically non-binding, they often carry significant regulatory heft in the form of persuasive power, as evidenced by major policy initiatives from joint employment and franchising to consumer lending policy originating from guidance. By creating public access portals for all agency guidance documents, the GOOD Act would enhance transparency, ensuring that the regulated public can better navigate and comply with regulatory expectations. The ultimate result of the GOOD Act would likely be to encourage agencies to confine their guidance to more formal methods of rulemaking — and thereby eventually make the portals created by the GOOD Act largely unnecessary.
- **Congress should require all federal employees to disclose their official communications with social media platforms if those communications attempt to influence content moderation decisions.**[17] The Government Accountability Office and the Inspector General of each federal agency should be required to present records of such exchanges to Congress, and those records should be made available to the public. (Of course, *Vullo* is not about the misuse of *federal* authority; that case was about a state-level disaster, and the facts of that case suggest that parallel state-level reforms would be appropriate as well.) These transparency reforms would deter significant portions of the kind of behavior that is generally understood as "jawboning"; furthermore, such reforms would create the groundwork for legal action if the revealed behavior appeared to be illegal or unconstitutional.

[13] Stone Washington, "Regulatory Advantages of the Administrative Law Court System," (April 17, 2024, Regulatory Studies Center, George Washington University), explains this proposal in more detail in its "Recommendations for Reform" section, p. 4.

[14] Dan Greenberg and Devin Watkins, "Constitutional Restoration: How to Rebuild the Separation of Powers" (Issue Analysis No. 2, 2023), Competitive Enterprise Institute, explains this proposal in more detail. Some policy recommendations in this paper have been superseded or made pointless by *Loper Bright*.

[15] H.R. 890/S. 791.

[16] Clyde Wayne Crews, "The 'Guidance Out of Darkness Act' Is the Low-Hanging Fruit of Regulatory Reform," March 21, 2023, Forbes.com, https://www.forbes.com/sites/waynecrews/2023/03/21/the-guidance-out-of-darkness-act-is-the-low-hanging-fruit-of-regulatory-reform/

[17] Andrew M. Grossman and Kristin A. Shapiro, "Shining A Light on Censorship: How Transparency Can Curtail Government Social Media Censorship and More," October 3, 2023, Briefing Paper No. 168, Cato Institute, explains this proposal in more detail.

- **Congress should pass the REINS Act,[18] which keeps overactive regulators in check by requiring Congress to vote in favor of major regulations before they become binding law.**[19] This measure would ensure direct congressional accountability both for express regulatory burdens as well as those that are not immediately obvious but implied. By requiring direct approval of major rules by both the House and Senate, considerable congressional control over the regulatory process would be recaptured and reaffirmed. Whether tabulated or unanimous consent votes on rules occur or whether they get approved alone or in bundles, Members of Congress should be on record for or against every costly, noteworthy, or controversial regulation.

- **Similarly, Congress should preserve its control over agencies by ending its own practice of delegating significant spending decisions to agencies.**[20] In particular, Congress should specify precisely how agencies may distribute federal funds to third parties; Congress should also require transparency from those parties about the receipt and subsequent disposition of those funds. Any significant agency discretion in this realm should be accompanied by the requirement that Congress must affirmatively and specifically approve such spending in subsequent legislation. Similarly, Congress should stop authorizing agencies to distribute funds to nonprofits in a way that allows those nonprofits significant discretion to pass along those funds to other parties. Consider, for instance, the Greenhouse Gas Reduction Fund created by the Inflation Reduction Act. Under that act, the Environmental Protection Agency is required to distribute $27 billion for "green" projects by September 30, 2024.[21] This network of low-accountability, high-discretion spending — in which the agency is granted broad discretion to spend billions of dollars and to send much of the money to nonprofits which themselves have broad discretion in how to distribute that money — is not only a recipe for scandals; it is a scandal just by itself. It is no exaggeration to say that this measure risks creating not only an agency slush fund but also an array of nonprofit slush funds. Such slush funds pose extraordinary dangers of cronyism, waste, and fraud.

- **Congress should reassert control over the CFPB and other similarly unaccountable federal bureaucracies by ending permanent appropriations processes that create invulnerability to congressional oversight and modification.**[22] Congress is responsible for guarding the public trust for all federal programs and all federal spending; the status quo, which allows the CFPB complete and unmodified discretion to capture and spend Treasury funds, is an unambiguous abandonment of Congress's guardianship of the public trust. Congress should therefore require the CFPB and other similarly unaccountable federal agencies to face the kind of scrutiny and monitoring that is part of the normal budget process.

- **Congress should amend the Administrative Procedure Act to end the worst abuses of agency rulemaking power.**[23] In general, Congress should prohibit agencies from promulgating rules that appear to be outside of the agency's expertise or general mission. In recent years, controversies over the exercise of agency authority have been generated by regulations that appear to have little or no connection with the policy decisions made by Congress — such as regulations that would reshape entire sectors of the economy or end commerce in socially valuable goods or services. This recommendation is informed by the "major questions" judicial doctrine; the development and emergence of that doctrine can be seen in a line of Supreme Court cases. Of course, the inherent limitations of courts prevent them from applying this doctrine to agency actions that are never examined by the judiciary; in contrast, Congress should be able to provide clear and comprehensive statutory prohibitions of agency misbehavior that would create a cause of action and serve as the first line of defense against them.

- **The culture of Congress must change.** Members of Congress need to confront the reality that, in significant respects, our federal legislature has failed to responsibly exercise the supervisory powers that it holds. Congress should make a searching and fearless inventory of the opportunities it has and how it might best exercise the powers it holds in the future, so that it more appropriately governs and supervises the decisions that agencies make.

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18 H.R. 277/S. 184.

19 Clyde Wayne Crews, "Rising Small Business Regs May Spur Senate To Pass REINS Act," June 7, 2023, Rising small business regs may spur Senate to pass REINS Act – Competitive Enterprise Institute (cei.org), explains this proposal in more detail.

20 Daren Bakst, "Congress, Not Agencies, Should Answer Major Policy Questions: A Legislative Blueprint for Restoring Representative Government," July 2024, Competitive Enterprise Institute, explains this proposal in more detail.

21 See "The Greenhouse Gas Reduction Fund: A Slush Fund for the EPA and Favored Nonprofits," Daren Bakst and Jacob Tomasulo, February 8, 2024, The Greenhouse Gas Reduction Fund: A slush fund for the EPA and favored nonprofits – Competitive Enterprise Institute (cei.org)

22 12 U.S.C. § 5497 (a)(2)(C) ("Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate."); *See also* Devin Watkins, "Congress Must Restore the Power of the Purse It Gave Away," National Review (June 12, 2024), https://www.nationalreview.com/2024/06/congress-must-restore-the-power-of-the-purse-it-gave-away/.

23 See "Congress, Not Agencies, Should Answer Major Policy Questions."

## Conclusion

This report does not address larger theoretical questions that recent Supreme Court decisions raise. Instead, it speaks to some extremely practical concerns about what the Supreme Court has done and how Congress can best enact sound public policy in this new environment. Many of the Supreme Court's opinions summarized above create a kind of danger. Members of Congress may not understand that what the Supreme Court has given them in recent months is not a victory, but an opportunity. In the decisions summarized above, the Supreme Court has functioned as a referee. In many respects, the Court has merely explained how disagreements between government bodies, or between public and private actors, must be resolved in the present and future. It is now up to Congress to exercise its policymaking powers responsibly.

The Court has illuminated a future of greater congressional authority, responsibility, and accountability. Congress now has more authority to make consequential decisions than it has had in decades. Our federal legislature should seize that opportunity.

## About the author

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