

No. 26-_____

IN THE
Supreme Court of the United States

JILLIAN LESKO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Employees Pay Act (FEPA) contains a provision giving the Office of Personnel Management (OPM) authority to “prescribe regulations . . . necessary for the administration of this subchapter.” 5 U.S.C. § 5548(a). The en banc Federal Circuit, splitting 7-4, held that this provision required it to adopt OPM’s definitions of terms in the FEPA, even where those definitions were contrary to the longstanding judicial construction of the statute.

The question presented is: Under this Court’s decision in *Loper Bright*, does the general rulemaking provision in 5 U.S.C. § 5548(a) delegate authority to OPM to authoritatively interpret FEPA, such that courts must adopt OPM’s definitions?

PARTIES TO THE PROCEEDINGS

The petitioner is Jillian Lesko. She was the plaintiff-appellant in the proceedings below.

The respondent is the United States. It was the defendant-appellee in the proceedings below.

RELATED PROCEEDINGS

Lesko v. United States, No. 1:22-cv-00715 CNL
(Fed. Cl. Mar. 21, 2023)

Lesko v. United States, No. 2023-1823 (Fed. Cir.
Dec. 12, 2025)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jillian Lesko respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. 1a-36a) is reported at 161 F.4th 1352. The Court of Federal Claims' order (Pet. App. 57a-74a) is reported at 164 Fed. Cl. 663. The opinion of the Federal Circuit panel on remand from the en banc court (Pet. App. 37a-56a) is reported at 166 F.4th 967.

JURISDICTION

The en banc Federal Circuit issued an opinion resolving the question presented here on December 12, 2025. Pet. App. 1a. The panel then issued an opinion resolving unrelated claims on January 30, 2026. Pet. App. 37a. A timely petition for rehearing en banc was filed on May 15, 2026, and rehearing en banc was denied on May 28, 2026. Pet. App. 79a-80a.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Appendix to this petition reproduces the relevant provisions of the Federal Employees Pay Act, 5 U.S.C. §§ 5542(a) and 5548(a). Pet. App. 81a, 82a. The relevant portions of the regulations (5 C.F.R. §§ 550.103 and 550.111) are also reproduced in the Appendix. Pet. App. 83a, 84a.

INTRODUCTION

“[C]ourts must exercise independent judgment in determining the meaning of statutory provisions.” *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024). Seven decades ago, the Federal Circuit’s predecessor did just that, interpreting a provision of the Federal Employees Pay Act (FEPA) that grants overtime pay to certain “hours of work officially ordered or approved.” *See Anderson v. United States*, 136 Ct. Cl. 365 (1956). It concluded that “hours of work officially ordered or approved” need not be ordered or approved in writing.

In this case, by contrast, the majority of a sharply divided en banc court reached exactly the opposite conclusion, not because it had changed its views about the best reading of the statute, but because it held that it was bound to adopt a definition promulgated by the Office of Personnel Management (OPM). The basis for its conclusion was 5 U.S.C. § 5548, a general rulemaking provision that gives OPM authority to “prescribe regulations . . . necessary for the administration of this subchapter.” But that general rulemaking provision does not contain any indication that Congress intended to empower OPM to authoritatively interpret the statute (that is, to interpret the statute such that courts are bound to its definitions). And it certainly didn’t do so with sufficient clarity to overcome the “presumption . . . that Congress expects courts to do their ordinary job of interpreting statutes.” *Loper Bright*, 144 S. Ct. at 2267.

The decision below functionally reinstates the *Chevron* deference that *Loper Bright* overruled. The

United States Code is chock full of general rulemaking provisions like Section 5548(a). If the Federal Circuit is right that general rulemaking provisions delegate authority to agencies to authoritatively define statutory terms—that is, to define terms so as to bind courts—courts will virtually always be in the business of adopting agency interpretations of statutes, and *Loper Bright* will have made little difference on the ground.

This Court regularly grants certiorari in cases that, like this one, are within the Federal Circuit’s exclusive appellate jurisdiction. This case warrants a spot on that Federal Circuit-oversight docket. As the sua sponte grant of rehearing en banc recognized, the stakes of the question presented are high. Its resolution will affect how over a million federal workers are paid and how the Federal Circuit does statutory interpretation throughout its vast administrative law docket. And although the precise question presented here could not arise in another circuit because of the Federal Circuit’s exclusive jurisdiction, the decision below also breaks ranks with at least one other court that has held that a similar provision does not give agencies license to authoritatively construe statutory language. *See Rangel-Fuentes v. Bondi*, 155 F.4th 1138 (10th Cir. 2025).

This Court should grant certiorari and reverse.

STATEMENT OF THE CASE

A. Legal Background

1. Congress passed the Federal Employees Pay Act of 1945 (FEPA) to make government pay rates “more in line with those in private industry.” Federal Employees Pay Act of 1945, CQ Almanac (1945), <https://library.cqpress.com/cqalmanac/document.php?id=cqal45-1403494>. Although the Government could not pay private-sector salaries, it made other efforts to even the pay scale.

As relevant here, FEPA guarantees overtime pay for certain professionals working in the federal government, including nurses. Congress has not done the same for all nurses working in the private sector. *See* 5 U.S.C. § 5542(a); 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.301(e)(2). Under FEPA’s Premium Pay subchapter, “hours of work *officially ordered or approved* in excess of 40 hours in an administrative workweek, or . . . in excess of 8 hours in a day, performed by an employee are overtime work” and are paid at an overtime rate (usually time-and-a-half). 5 U.S.C. § 5542(a) (emphasis added).

2. FEPA’s Premium Pay subchapter specifically empowers the Office of Personnel Management (OPM) to authoritatively define particular statutory terms. For example, under one provision, OPM has the authority to “*determine*” what “‘law enforcement officer’ *means*.” 5 U.S.C. § 5541(3)(D)(i) (emphases added). Under another, overtime hours for some employees (though not for nurses) are those hours “*deemed* to be overtime hours” by OPM. *Id.* § 5542(c) (emphasis added).

No provision specifically grants OPM the power to authoritatively define the phrase “officially ordered or approved,” the phrase in the overtime provision relevant for nurses. *See* 5 U.S.C. § 5542(a). However, OPM and its predecessor have long offered a definition of that phrase. A regulatory section entitled “Definitions” says that “[o]vertime work has the meaning given that term in § 550.111.” *See* 5 C.F.R. § 550.103. Section 550.111, in turn, states that “officially ordered or approved” means authorized “*in writing*” by an officer or employee to whom this authority has been specifically delegated.” *Id.* § 550.111(c) (emphasis added).

The agency enacted its interpretation of the statutory language pursuant to a general rulemaking provision giving OPM authority to “prescribe regulations . . . necessary for the administration of this subchapter.” 5 U.S.C. § 5548(a). The text of that general rulemaking provision does not mention the power to issue definitions or interpretations of statutory terms.

3. The Federal Circuit and its predecessor court have thrice considered the “officially ordered or approved” language. First, in *Anderson v. United States*, 136 Ct. Cl. 365 (1956), the Court of Claims¹ held that the statutory phrase “officially ordered or approved” did not require authorization in writing. *Id.* at 371. Because that case predated *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984), the Court did not defer to the OPM regulation stating otherwise and

¹ The Court of Claims was the Federal Circuit’s predecessor, and the Federal Circuit is bound by its opinions. Pet. App. 5a.

instead used the ordinary tools of statutory construction to determine the best meaning of the phrase. *Id.*

Second, in *Doe v. United States*, 372 F.3d 1347 (Fed. Cir. 2004), the Federal Circuit changed course, holding that, in fact, “officially ordered or approved” *did* mean authorized in writing. The Federal Circuit did not disagree with *Anderson* as to the best reading of that phrase. *Id.* at 1359. But because *Doe* postdated *Chevron*, the Federal Circuit simply found OPM’s regulation “entitled to *Chevron* deference” and thus allowed the regulation to supersede *Anderson*’s construction of the statute. *Id.*

The third case, *Mercier v. United States*, 786 F.3d 971 (Fed. Cir. 2015), considered the same phrase, “officially ordered or approved,” in a parallel statute governing overtime for Department of Veterans Affairs healthcare employees. Because no agency interpretation applied to that parallel statute, the Federal Circuit was free to look at the plain text of the statute, which it (again) interpreted to include orders or approvals that were not in writing. *Id.* at 972. It also confirmed that the FEPA provision should have “the same meaning as the same words” in that parallel VA statute—that is, the best reading of “officially ordered or approved” in FEPA is not limited to written authorizations alone. *Id.* at 973.

B. Factual Background

1. The COVID-19 pandemic put extreme stress on healthcare workers. Off. Health Pol’y, U.S. Dep’t of Health & Hum. Servs., HP-2022-13, *Impact of the COVID-19 Pandemic on the Hospital and Outpatient*

Clinician Workforce 1 (2022), <https://perma.cc/WZE8-MHFT>. Nurses were “inundated with sick patients,” and hospitals were “often short staffed.” First Am. Compl. ¶ 42, ECF No. 9. Insufficient staffing levels and low pay drove some 97,000 registered nurses from the healthcare profession during the pandemic. Brendan Martin et al., *Examining the Impact of the COVID-19 Pandemic on Burnout and Stress Among U.S. Nurses*, 14 J. of Nursing Reg. 4, 10 (2023).

The pandemic hit the federal Indian Health Service particularly hard. See Gov’t Accountability Office, *Indian Health Service: Relief Funding & Agency Response to COVID-19 Pandemic* 4, 17 fig. 1. (2022). Chronically underfunded and overwhelmingly located in rural communities with few medical professionals, Indian Health Service facilities struggled more than even other hospitals to find medical personnel willing to care for their patients. *Id.* at 19 fig. 2; see Matthew Tobey et al., *Comparing Indian Health Service Sites to Rural Physician Teaching Hospitals*, 185 JAMA Internal Medicine 1040-42 (2025).

2. Petitioner Jillian Lesko was an Indian Health Service nurse during the pandemic. First Am. Compl. ¶¶ 1, 4, ECF No. 9. Ms. Lesko had spent over two decades serving her patients and her country as a nurse and nurse practitioner, including for nearly eight years as a nurse in the United States Navy. During the pandemic, Ms. Lesko and other nurses like her put their lives at risk to “care[] for the nation’s sick and dying.” *Id.* ¶ 41.

Due to the volume and urgency of patient need, supervisors and managers “routinely required nurses

to stay after hours.” *Id.* ¶ 42. Supervisors also routinely short-staffed Indian Health Service facilities. Nurses therefore had to work past their shifts because no one was there to replace them. Had the nurses refused to do so, they would have put their patients’ lives at risk. *Id.* ¶ 50. In addition, supervisors required nurses to take on responsibilities they knew could not be completed during normal working hours. *Id.* ¶ 42. And if nurses failed to complete all that required work, they would risk “discipline and/or losing professional licenses.” *Id.* ¶ 50.

Ms. Lesko was never paid for her overtime work. *Id.* ¶ 55. More than 1,000 of Ms. Lesko’s fellow nurses were similarly denied overtime pay. *Id.* ¶ 67.

Supervisors and managers knew that each of the nurses was working “tremendous amounts of overtime”: The Indian Health Service health record system tracks the activities of nurses and would show significant overtime. *Id.* ¶¶ 11, 29, 44-45. Supervisors even occasionally acknowledged Ms. Lesko’s overtime work by offering her some time off in lieu of money as compensation (time off they then forbade her from taking because of the pandemic). *Id.* ¶ 79. However, Ms. Lesko’s supervisors never explicitly ordered or approved her overtime hours in writing.

C. Procedural Background

1. In 2022, Ms. Lesko filed a complaint in the Court of Federal Claims on behalf of herself and a class of other Indian Health Service nurses. First Am. Compl., ECF No. 9. As relevant here, she alleged that the Government “officially ordered or approved” overtime hours but did not pay her for those hours and

certainly did not pay her at the overtime rate the statute promised. *Id.* ¶¶ 54-55. The Government moved to dismiss, arguing that Ms. Lesko’s overtime hours were not “officially ordered or approved” because they were not ordered or approved in writing, as required by the OPM regulation. Pet. App. 58a.

Issuing its ruling prior to *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the Court of Federal Claims dismissed Ms. Lesko’s case. Under the then-extant *Chevron* regime, in cases where a statute was “silent or ambiguous,” a reviewing court could not “simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.” *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984); Pet. App. 67a. Instead, the reviewing court must defer to the agency if it had offered “a permissible construction of the statute.” *Chevron*, 467 U.S. at 843.

The Court of Federal Claims thus deferred to OPM’s regulation construing “officially ordered or approved” to include only orders or approvals in writing. Pet. App. 67a.

2. Ms. Lesko appealed to the Federal Circuit. Pet. App. 8a. While her appeal was pending, this Court decided *Loper Bright*. That decision ended the *Chevron* era and held that a court’s interpretive task is fundamentally the same “[i]n an agency case as in any other”: “to independently interpret the statute.” *Loper Bright*, 144 S. Ct at 2266. Even when faced with a statute that is “silent or ambiguous,” a court must “apply[] all relevant interpretive tools” to find the “best meaning” of the statute. *Id.*

Loper Bright acknowledged that in some cases, Congress authorized agencies to “exercise a degree of discretion.” *Id.* at 2263. It gave three examples of such statutory provisions: (1) provisions that “expressly delegate[e]” authority to define a term; (2) provisions that allow an agency to “fill up the details” of a statute; and (3) provisions that let an agency “regulate subject to the limits imposed by a term” that provides some flexibility, such as “reasonable.” *Id.* at 2263.

3. Following *Loper Bright*, the Federal Circuit sua sponte decided to hear this case en banc. Pet. App. 8a. In a 7-4 split decision, the Federal Circuit affirmed the dismissal of Ms. Lesko’s claim. Pet. App. 2a.

a. The majority acknowledged at the outset that, in general, it was not supposed to “give any deference to the agency interpretation of the language of the statute.” Pet. App. 12a. However, it went on to adopt OPM’s interpretation of the phrase “officially ordered or approved.”

The majority began by concluding that the “plain language of the statute” does not require that orders or approvals be in writing. Pet. App. 12a. It also found that dictionary definitions of the terms in the statute did not answer the question at issue. Pet. App. 10a-12a. As a result, it held that Congress “was silent as to the requisite formalities” that the phrase “officially ordered or approved” requires. Pet. App. 12a.

The majority next asked whether 5 U.S.C. § 5548(a)—which allows OPM to “prescribe regulations, subject to the approval of the President, necessary for the administration of this subchapter”—fit within any of the three categories of delegations identified by *Loper Bright*. Pet. App. 12a. It did not

suggest that Section 5548(a) fell within the first category because it was not an express delegation to define statutory terms. *Id.* 13a. But it held that Section 5548(a) fit within the second and third categories, fill-up-the-details delegations and flexible delegations. *Id.* 13a-14a.

The majority therefore concluded that although “the overtime statute is silent as to the formalities required to officially order or approve overtime,” it was “not silent about *who* Congress intended to fill in those details”—OPM, not courts. Pet. App. 12a. The majority thus did not go on to itself further analyze what formalities the statute required. Instead, it assessed only whether OPM “engaged in reasoned decision making within the boundaries of its delegated authority” when it adopted the writing requirement. *Id.* 18a. Because OPM did so, the Federal Circuit adopted the definition promulgated by OPM and affirmed the dismissal of Ms. Lesko’s claim. *Id.* 21a.

b. Judge Stoll, joined by three others, dissented. The dissent agreed that the phrase “officially ordered or approved” could be susceptible to multiple interpretations. *See* Pet. App. 23a. But it understood *Loper Bright* to require judges to interpret ambiguous or silent statutory text using “every tool at their disposal to determine the best reading of the statute.” *Id.*

The dissent did just that. For instance, the dissent pointed out that another section of FEPA, about overtime for U.S. Customs and Border Protection employees, expressly requires that overtime be approved in writing. *Id.* 23a-24a (discussing 5 U.S.C. § 5542(g)(4)(B)). Moreover, the dissent noted that the

majority did not question *Mercier*, which interpreted the same statutory phrase (“officially ordered or approved”) in a very similar statutory scheme (governing overtime hours for Department of Veterans Affairs employees) to cover authorizations not in writing. *Id.* 25a-26a. The dissent concluded that “there is a best meaning for the statutory language ‘officially ordered or approved’: it includes orders or approvals for overtime that are not put in writing.” *Id.* 23a.

The dissent further explained “there is no delegation to the agency to change the plain meaning of ‘officially ordered or approved’ under *Loper Bright*.” Pet. App. 26a. The majority’s “purported delegation is not clear or direct, especially in comparison to the exemplary delegations identified in *Loper Bright*.” *Id.* 27a. Section 5548(a) “does not refer back to § 5542 or to the phrase ‘officially ordered or approved,’” does not mention “discretion to define or interpret statutory terms,” and covers “over a dozen” sections of the U.S. Code and “countless broad terms.” Pet. App. 29a. *Loper Bright*’s general rule thus governs, and “the agency’s choice of language cannot override the best meaning of Congress’s chosen language.” Pet. App. 35a.

4. The en banc court then remanded the case to the panel for further proceedings. Pet. App. 21a. The panel issued an opinion regarding Ms. Lesko’s other claims. Pet. App. 37a. Ms. Lesko petitioned for rehearing en banc, and her petition was denied by the Federal Circuit on May 28, 2026. Pet. App. 79a-80a.

REASONS FOR GRANTING THE WRIT

As the Federal Circuit majority acknowledged, the United States Code contains countless general rulemaking provisions like the one at issue here. Pet. App. 19a n.11. On the majority's logic, then, in the mine run of agency cases, a court will wind up adopting an agency's interpretation of statutory terms. That result cannot be squared with *Loper Bright*, which specifically *rejected* the idea that court could simply adopt an "agency's answer" any time a "statute is silent or ambiguous with respect to a specific issue." 144 S. Ct. at 2290. Indeed, if the en banc majority were correct, *Chevron* might as well still govern.

This Court should grant certiorari. The question presented will affect not only tens of thousands of federal workers but also the Federal Circuit's approach to its vast administrative law docket. Because the Federal Circuit has exclusive appellate jurisdiction over FEPA claims involving overtime, no further percolation is possible. And this is the rare case that comes with concrete proof that the question about delegation is outcome-determinative: The Federal Circuit has twice authoritatively construed the statutory phrase at issue contrary to OPM's definition. If this Court holds that deference is inappropriate here, those contrary definitions would presumably govern, and petitioner's case will be allowed to proceed.

I. The decision below is wrong.

A. Section 5548(a) does not delegate authority to OPM to authoritatively interpret FEPA.

Recall the stakes of this case. OPM issued a “[d]efinition” that purported to decide the “meaning given” to a statutory term—a quintessentially judicial function. *See* 5 C.F.R. § 550.103. The Federal Circuit majority then held that it was bound to adopt OPM’s definition because of Section 5548(a).

But Section 5548(a) does not give OPM any such license. The majority below reached a contrary conclusion only by misreading *Loper Bright*.

1. *Loper Bright* teaches that there is a “presumption . . . that Congress expects courts to do their ordinary job of interpreting statutes.” 144 S. Ct. at 2267. When Congress wants to override that presumption by having agencies authoritatively interpret statutes, it ordinarily does so explicitly. FEPA itself, for instance, contains one provision allowing OPM to “*determine*” what “law enforcement officer’ *means*” and another allowing it to decide what hours to “*deem*” as overtime worked by certain employees (though not nurses). *See* 5 U.S.C. §§ 5541(3)(D)(i), 5542(c) (emphases added). Pursuant to those provisions, OPM is empowered to define the relevant terms, and courts must follow those definitions, so long as they are reasonable.

There is no such language in Section 5548(a). Instead, Section 5548(a) is simply a general rulemaking provision—of the sort ubiquitous throughout the United States Code—giving OPM authority to “prescribe regulations . . . necessary for

the administration of this subchapter.” 5 U.S.C. § 5548(a). That provision gives OPM license to promulgate necessary regulations to administer the premium pay provisions where there is no relevant statutory text. OPM could, for instance, specify that paychecks go out on Wednesdays—there’s no statutory text to interpret about which day is payday, and setting a pay day may be “necessary” to doling out premium pay.

But here, the statute *already* tells us which hours count as overtime—those that are “officially ordered or approved.” *See* 5 U.S.C. § 5542(a). And there’s no indication in Section 5548(a) that Congress intended to give OPM the power to usurp the judicial role by interpreting statutory terms in a way that binds courts. At the time FEPA was enacted, agencies were not generally understood to possess such authority. *See* 144 S. Ct. at 2257-61. The Congress that drafted FEPA thus surely would not have thought that authoritatively defining statutory terms was “necessary for the administration” of FEPA. *See* 5 U.S.C. § 5548(a).

Lest there be any doubt, consider the provisions listed above—the ones that expressly empower OPM to define statutory terms. *Supra* at 14. “[W]here Congress includes particular language in one section of a statute but omits it in another,” courts should assume Congress intended the two to be construed differently. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted)). Congress knew how to delegate to an agency the power to

authoritatively define statutory terms. It did so elsewhere in FEPA, but not in Section 5548(a).

2. Without engaging with any of that text, the Federal Circuit concluded that Section 5548(a) compelled it to adopt OPM's definition of "officially ordered or approved" wholesale. The sole basis for that conclusion was that Section 5548(a) was one of the "type[s] of delegations" discussed in *Loper Bright*. Pet. App. 13a.

Recall that *Loper Bright* acknowledged that Congress sometimes "authorize[s]" an agency "to exercise a degree of discretion." 144 S. Ct. at 2263. The Court gave three examples of such delegations: Congress (1) sometimes "expressly delegate[s];"² (2)

² *Loper Bright* cited *Batterton v. Francis*, 432 U.S. 416 (1977) as an example of this first kind of delegation. *Loper Bright*, 144 S. Ct. at 2263. In *Batterton*, this Court held that a provision referencing the "unemployment . . . as determined in accordance with standards prescribed by the Secretary" delegated to the Secretary the power to define the term "unemployment." *Id.* at 418 n.2, 425 (discussing 42 U.S.C. § 607).

Loper Bright also provided two additional examples of an express delegation in a footnote:

29 U.S.C. § 213(a)(15) (exempting from provisions of the Fair Labor Standards Act "any employee employed on a casual basis in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of the Secretary*)" (emphasis added)); 42 U.S.C. § 5846(a)(2) (requiring notification to Nuclear Regulatory Commission when a facility or activity licensed or regulated pursuant to the Atomic Energy Act "contains a

sometimes “empower[s] an agency . . . to fill up the details” of a statute;³ and (3) sometimes allows agencies “flexibility” to regulate, subject to a statutory “limit[.]”⁴ The majority below held that Section 5548(a) fell within the second and third of those categories and concluded that, as a result, the Federal Circuit was bound to adopt OPM’s interpretation of the statutory text. Pet. App. 13a-14a.

Where *Loper Bright* gave an inch, the en banc majority took a mile. It erred twice over in its reading of the opinion.

defect which could create a substantial safety hazard, *as defined by regulations which the Commission shall promulgate*” (emphasis added)).

144 S. Ct. at 2263 n.5 (emphasis in original).

³ *Loper Bright* cited *Wayman v. Southard*, 10 Wheat. 1, 43 (1825), as an example of this second kind of delegation. *Loper Bright*, 144 S. Ct. at 2263. *Wayman* dealt with a statute that instructed federal courts to borrow state-court procedural rules but allowed certain “alterations and additions.” 23 U.S. at 31.

⁴ *Loper Bright* cited *Michigan v. EPA*, 576 U.S. 743, 752 (2015), as an example of this third kind of delegation. *Loper Bright*, 144 S. Ct. at 2263. *Michigan* dealt with a regulation allowing the EPA to regulate power plants only “if the Agency finds such regulation is appropriate and necessary.” 576 U.S. at 752 (quoting 42 U.S.C. § 7412(n)(1)(A)).

Loper Bright also provided an additional example of a flexible delegation in a footnote. See 144 S. Ct. at 2263 n.6 (“33 U.S.C. § 1312(a) (requiring establishment of effluent limitations ‘[w]henever, in the judgment of the [Environmental Protection Agency (EPA)] Administrator . . . , discharges of pollutants from a point source or group of point sources . . . would interfere with the attainment or maintenance of that water quality . . . which shall assure’ various outcomes, such as the ‘protection of public health’ and ‘public water supplies’)”) (modifications in original).

a. First, *Loper Bright* nowhere suggested that the second and third categories of delegation give an agency the power to authoritatively construe a statute. Indeed, *Loper Bright* explicitly contrasted the first category of delegations with the second two: “[E]xpress” delegations give an agency “the authority to give meaning to a particular statutory term”; fill-up-the-details and flexible delegations give agencies other powers. *Loper Bright*, 144 S. Ct. at 2263. *Cf.* Br. of the Chamber of Commerce as Amicus Curiae in support of the Petition for a Writ of Certiorari, *Sprint Corp. v. FCC*, No. 25-1422 (July 27, 2026) (second two *Loper Bright* categories “do not authorize agencies to define statutory terms”).

It would have been particularly incongruous for the Court that wrote *Loper Bright* to suggest that the second and third categories of delegation confer upon agencies the power to authoritatively define terms. *Loper Bright* made clear that interpreting terms in a statute is a court’s “solemn duty.” *See id.* at 385 (quoting *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 162 (1841) (Story, J.)). That same Court presumably would not have described interpreting terms in a statute as “filling up details.” And the statute at issue in *Loper Bright* itself included a “flexible” delegation, granting the National Marine Fisheries Service authority to “prescribe such other measures . . . as are determined to be necessary and appropriate.” *See Loper Bright*, 144 S. Ct. at 2255 (quoting 16 U.S.C. § 1853(b)(14)). Yet this Court nowhere suggested that might allow courts to adopt the agency’s construction of the statute.

b. In any event, general rulemaking provisions like Section 5548(a) were “notably absent from the examples offered by the *Loper Bright* Court.” Kristin E. Hickman & Amy J. Wildermuth, *Harmonizing Delegation and Deference after Loper Bright*, 100 N.Y.U. L. Rev. 1924, 1972 (2025). The Federal Circuit majority was wrong to suggest Section 5548(a) fits within either *Loper Bright*’s “fill up the details” category or its “flexible” delegations category.

Section 5548(a) isn’t a fill-up-the-details delegation. In *Wayman*, the example *Loper Bright* gave of such a delegation, the statute licensed courts to make “alterations or additions” to state procedural rules. *Wayman v. Southard*, 10 Wheat. 1, 43 (1825) (discussed in *Loper Bright*, 144 S. Ct. at 2263). In other words, the statute expressly authorized a departure from the text of the state procedural rules. Section 5548(a) contains no such direction. Instead, it requires OPM to make rules consistent with the text of FEPA—it authorizes rules “necessary for the administration” of the FEPA subchapter, not rules that alter or add to the subchapter.

Moreover, as Justice Gorsuch has explained in another context, the “fill-up-the-details” delegation in *Wayman* covered a delimited subject matter and set “sufficiently definite and precise” standards. *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting); *see also id.* at 2136 (footnotes omitted) (giving other examples, such as statute directing the IRS “to design tax stamps for margarine packages”). Section 5548(a)’s general grant of rulemaking authority, covering a whole subchapter, is not nearly as “definite and precise.” *Id.* at 2142.

Nor is Section 5548(a) a flexible delegation. The majority below believed Section 5548(a) fell into *Loper Bright*'s third category because it shared the word "necessary" with those examples. But the "flexible delegation" examples in *Loper Bright* have not only broad words like "appropriate" or "necessary," but *also* language that made clear that the *agency's* view of what's appropriate or necessary (not a court's) is dispositive—language like "in the judgment of the Administrator" or "if the Administrator finds." *See supra* n. 4. Section 5548(a) contains no comparable language.

c. Taking a step back, the delegations cited in *Loper Bright*—whichever category they fall into—are all far more specific than Section 5548(a). *See* Pet. App. 29a (Stoll, J., dissenting). They're specific about subject matter: One statute authorizes agency limitations on specific pollutants, discharged in certain ways, in certain waterways, from certain sources, and only after certain findings. *Loper Bright*, 144 S. Ct. at 2263 n.6 (quoting 33 U.S.C. § 1312(a)). And they're specific about what parts of the statute the agency can exercise authority over. The delegation language cited in *Loper Bright* references a specific subparagraph—sometimes, even a specific sentence.

Section 5548(a) doesn't fit with those examples. It isn't limited to the specific subject of ordering or approving overtime. And it gives authority over a whole subchapter, spanning some dozen sections and twenty pages of the U.S. Code. *See* 5 U.S.C. §§ 5542(a), 5548(a), <https://perma.cc/S6UD-UALU>. It's thus far afield of the examples this Court supplied in *Loper Bright*.

B. The approach the en banc majority deployed here functionally reinstates *Chevron*.

1. *Loper Bright* ended the era of deferring to an agency simply because a statute is “silent or ambiguous.” 144 S. Ct. at 2254 (quoting *Chevron*, 467 U.S. at 843). The en banc majority below claimed to be faithful to that *Loper Bright* rule, professing not to “give any deference to the agency interpretation of the language of the statute.” Pet. App. 12a.

But the majority’s process of statutory construction is functionally indistinguishable from *Chevron*. First, the majority below identified a “silence” in the statute—dictionary definitions standing alone, it found, did not definitively address whether “officially ordered or approved” meant authorized in writing. *See* Pet. App. 10a-11a. But the majority did not go on to use “every tool at [its] disposal,” as *Loper Bright* commands. Had it done so, it would have reached the same conclusion as the dissent and prior cases—that the phrase “officially ordered or approved” includes authorizations that are not in writing. *See* Pet. App. 23a-26a (Stoll, J., dissenting) (looking to structure, context, and rest of statute to interpret plain text of statute); *Anderson*, 136 Ct. Cl. at 371; *Mercier*, 786 F.3d at 972-73. Instead, it adopted OPM’s construction of the phrase. Pet. App. 20a-21a.

The end result is exactly what *Loper Bright* decried: A regime that “forces courts” to adopt an agency’s construction without determining whether that reading is the “single, best meaning” (and, in this case, “even when a pre-existing judicial precedent

holds that the statute means something else”). 144 S. Ct. at 2265.

2. To be sure, the majority purported to honor *Loper Bright* by inserting an extra step between finding “silence or ambiguity” and adopting the agency’s definition: It looked for a *Loper Bright* delegation from Congress. But if such a delegation can be found in a provision as general and ubiquitous as Section 5548(a), that extra step is no extra step at all. The United States Code is chock full of such provisions. Flip to just about any subchapter of the U.S. Code, and odds are you’ll find one.⁵ Most agencies can point to a general rulemaking provision in their enabling statute as well.⁶ And these general

⁵ See, e.g., 7 U.S.C. § 136w(a)(1) (authorizing the Administrator of the Environmental Protection Agency “to prescribe regulations to carry out the provisions of this subchapter.”); 21 U.S.C. § 371(a) (giving Secretary of Health & Human Services “the authority to promulgate regulations for the efficient enforcement of” Food, Drug, and Cosmetic Act); 29 U.S.C. § 156 (authorizing National Labor Relations Board “to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of” the National Labor Relations Act); 47 U.S.C. § 201(b) (authorizing Federal Communications Commission to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provision of” the Federal Communications Commission Act). See also Pet. App. 19a n.11 (collecting five other examples).

⁶ Jennifer L. Selin & David E. Lewis, Sourcebook of United States Executive Agencies 118–19 (Admin. Conf. of U.S., 2d ed. 2018); see, e.g., 12 U.S.C. § 5512(b)(1) (CFPB); 5 U.S.C. § 1204(h) (MSPB); 29 U.S.C. § 156 (NLRB); 15 U.S.C. § 46(g) (FTC); 21 U.S.C. § 371(a) (HHS); 52 U.S.C. § 30107(a)(8) (FEC); 22 U.S.C. § 2651(a)(4) (State); 49 U.S.C. § 5334(a)(11) (Transportation); 38 U.S.C. § 501 (VA); 42 U.S.C. § 405(a) (SSA).

rulemaking provisions often reference capacious subchapters. For instance, 42 U.S.C. § 1395hh(a)(1) authorizes the Department of Health and Human Services to “prescribe such regulations as may be necessary to carry out the administration of the insurance programs under this subchapter”—“this subchapter” meaning the entire \$1 trillion Medicare program.

The en banc majority’s reading would thus functionally resurrect *Chevron* deference by compelling a court to defer to an agency’s regulations whenever they are issued pursuant to one of these general rulemaking provisions—meaning in just about every case. That would read one sentence in *Loper Bright* to swallow the rest of the opinion.

“The case that declared ‘*Chevron* is overruled’ didn’t quietly reinstitute it.” *Moctezuma-Reyes v. Garland*, 124 F.4th 415, 421 (6th Cir. 2024) (Thapar, J.) (quoting *Loper Bright*, 144 S. Ct. at 2273). *Loper Bright* reflects the fundamental constitutional rule that “[i]t is emphatically the province and duty of the *judicial* department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). A reading of *Loper Bright* that subverts that fundamental rule cannot be correct.

3. Jurists and administrative law experts agree that *Loper Bright*’s overruling of *Chevron* would be meaningless if general rulemaking provisions like Section 5548(a) can trigger deference. Judge Bush has opined that “expand[ing] deference to agencies based on general delegations” would deny “*Loper Bright* its teeth.” *U.S. Dep’t of Lab. v. Americare Healthcare Servs., Inc.*, 171 F.4th 838, 855, 857 (6th Cir. 2026)

(Bush, J., concurring). Echoing the sentiment, the Tenth Circuit held that doing so would “render *Loper Bright* essentially toothless.” *Rangel-Fuentes v. Bondi*, 155 F.4th 1138, 1143 (10th Cir. 2025). Professor Thomas Merrill, whose work was cited prominently in *Loper Bright* itself, wrote that reading the *Loper Bright* examples of delegation too “broadly” would “restor[e] a large part of the discretionary authority taken away with the overruling of *Chevron*.”⁷ And the Chamber of Commerce recently filed an amicus brief arguing that a “statute’s general rulemaking provision—without more—does not constitute a *Loper Bright* delegation” and urging that “to hold otherwise would reinvent *Chevron* under a new name.” Br. of the Chamber of Commerce as Amicus Curiae in support of the Petition for a Writ of Certiorari 3, *Sprint Corp. v. FCC*, No. 25-1422 (July 27, 2026).

* * *

In sum, the decision below finds no support in the text of FEPA. And far from finding support in *Loper Bright*, it would have the practical effect of gutting that case. It should be reversed.

⁷ Thomas W. Merrill, *The Demise of Deference—And the Rise of Delegation to Interpret?*, 138 Harv. L. Rev. 227, 265 (2024); see also Ellen P. Aprill, *Unpacking the Most Important Paragraph in Loper Bright*, Yale J. on Regul. (Jan. 15, 2025), <https://perma.cc/2KJ3-HW6P> (“If such delegations suffice, there could be surprisingly little left of *Loper Bright*’s overruling of *Chevron* as a practical matter.”).

II. The question presented is important.

Over the past five Terms, this Court has granted certiorari in ten cases where the Federal Circuit has exclusive appellate jurisdiction, such that no circuit split was possible.⁸ This is such a case: The Federal Circuit has exclusive appellate jurisdiction over claims for overtime pay under FEPA. *See* 28 U.S.C. §§ 1295(a), 1346, 1491. The Federal Circuit recognized that this case warranted en banc consideration and then issued a deeply divided decision, two considerations this Court often weighs in deciding to grant certiorari.⁹ And it granted en banc consideration sua sponte—something it has done for only four other

⁸ *See Soto v. United States*, 605 U.S. 360 (2025); *Feliciano v. Dep’t of Transp.*, 605 U.S. 38 (2025); *Bufkin v. Collins*, 604 U.S. 369 (2025); *Harrow v. Dep’t of Def.*, 601 U.S. 480 (2024); *Rudisill v. McDonough*, 601 U.S. 294 (2024); *Vidal v. Elster*, 602 U.S. 286 (2024); *Amgen Inc. v. Sanofi*, 598 U.S. 594 (2023); *Arellano v. McDonough*, 598 U.S. 1 (2023); *George v. McDonough*, 596 U.S. 740 (2022); *Minerva Surgical, Inc. v. Hologic, Inc.*, 594 U.S. 559 (2021).

⁹ *See, e.g., Warner-Jenkinson Co., Inc. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997) (noting “significant disagreement within the [en banc] Court of Appeals for the Federal Circuit”); *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 306 (2020) (reversing the holding of “[a] divided panel of the United States Court of Appeals for the Federal Circuit” regarding a Tucker Act claim); *United States v. Winstar Corp.*, 518 U.S. 839, 859 (1996) (noting the en banc dissent below); *WesternGeco LLC v. ION Geophysical Corp.*, 585 U.S. 407, 412 (2018) (noting a divided panel below).

cases in the last decade (two of which wound up before this Court).¹⁰

This case warrants a slot on this Court’s Federal-Circuit-oversight docket. The stakes of the question presented are high for Ms. Lesko and for other federal employees. The decision below will have ripple effects throughout the Federal Circuit’s vast administrative law docket. And, though this Court by definition does not look for circuit splits when deciding whether to grant certiorari to decide questions that can only arise in the Federal Circuit,¹¹ answering the question presented would have the added benefit of providing guidance to lower courts grappling with general rulemaking provisions after *Loper Bright*.

¹⁰ See *NantKwest, Inc. v. Matal*, 869 F.3d 1327 (Fed. Cir. 2017), *cert. granted sub nom. Iancu v. NantKwest, Inc.*, 139 S. Ct. 1292 (2019); *Arellano v. Wilkie*, 970 F.3d 1362 (Fed. Cir. 2020), *cert. granted sub nom. Arellano v. McDonough*, 142 S. Ct. 1106 (2022); *Taylor v. McDonough*, 4 F.4th 1381 (Fed. Cir. 2021); *Moore v. United States*, 66 F.4th 990 (Fed. Cir. 2023).

¹¹ See, e.g., Pet. at 13, *Feliciano v. Dep’t of Trans.*, 145 S. Ct. 1284 (2025) (No. 23-861) (“Because the Federal Circuit has exclusive jurisdiction over differential pay cases arising in the MSPB, no conflict among the circuits can or will develop.”); Pet. at 34, *Bufkin v. Collins*, 145 S. Ct. 728 (2025) (No. 23-713); Pet. at 10, *Vidal v. Elster*, 144 S. Ct. 1507 (2024) (No. 22-704) (acknowledging “absence of a circuit conflict”); Pet. at 13, *Amgen, Inc. v. Sanofi*, 143 S. Ct. 1243 (2023) (No. 21-757); Pet. at 3-4, *Rudisill v. McDonough*, 144 S. Ct. 945 (2024) (No. 22-888) (“Given that the Federal Circuit is the only Court of Appeals with jurisdiction over GI Bill cases of this nature, no further percolation of that statutory question is possible, now that the en banc Federal Circuit has ruled.”).

1. Start with the stakes for federal workers like Ms. Lesko.

a. FEPA’s overtime provision covers over a million federal employees. Roughly speaking, FEPA’s overtime provision applies to “executive, administrative, [and] professional” workers outside the V.A. *See* 29 U.S.C. § 213(a)(1); 5 U.S.C. §§ 5542(a), (c); *Mercier v. United States*, 786 F.3d 971, 973 (Fed. Cir. 2015). That includes the majority of the two million federal civilian employees. It covers professions ranging from firefighters to architects, health professionals to clerical workers. *See* Off. of Personnel Mgmt., *Federal Workforce Data*, <https://perma.cc/5RCY-8RHK>; Drew DeSilver, *What the Data Says About Federal Workers*, Pew Rsch. Ctr. (Jan. 7, 2025) <https://perma.cc/F3QE-W7TU>.

No surprise, then, that FEPA overtime is a recurring issue. Numerous employees across a range of federal departments have brought challenges alleging unpaid overtime under FEPA. *See Naltner v. United States*, 173 Fed. Cl. 738 (Ct. Cl. 2024) (class action brought by Secret Service employees); *Doe v. United States*, 372 F.3d 1347, 1349 (Fed. Cir. 2004) (by 9,000 Department of Justice employees); *Bishop v. United States*, 72 Fed. Cl. 766, 767 (Ct. Cl. 2006) (by 583 guards in the Bureau of Prisons).

b. The decision below shifts the balance of power between the federal government and its employees. In the vast majority of cases, of course, the government official directing an employee to work overtime also intends to pay the employee, such that the meaning of “officially ordered or approved” doesn’t much matter. But in cases where the government official does *not*

intend to do so, the Federal Circuit's interpretation of the phrase provides a roadmap: Under the Federal Circuit's ruling, the Government can demand more hours from its employees and, just so long as no government official puts that demand in writing, avoid paying its employees for that extra time. With budgetary constraints facing many federal departments, including the Indian Health Service, the incentive to deny overtime pay is great.

The majority below acknowledged that concern but claimed that employees can "demand written authorization prior to working overtime." Pet. App. 21a. Nonsense. Government officials authorized to require overtime typically also wield tremendous power over their subordinates—they assign shifts, decide on promotions, dole out assignments, and can even terminate employees. As this case vividly illustrates, the practical reality is that many federal employees are routinely compelled to work overtime without written authorization.

c. At the very least, the question presented matters enormously for Ms. Lesko and nurses like her. During the COVID pandemic, Ms. Lesko put her life on the line for her patients, working extra hours that exposed her to a then-deadly virus. Yet she was not paid a cent for those extra hours, let alone the statutorily required overtime pay. And some 1,000 nurses are in the same position. This Court should grant certiorari to give them a shot at getting compensation for their time.

2. Deciding the question presented will have ripple effects well beyond FEPA. When the Federal

Circuit adopts an approach to agency deference, it impacts much of the administrative state.

The Federal Circuit has exclusive appellate jurisdiction over several administrative agencies, including the Merit Systems Protection Board and the Patent Trial and Appeal Board. 28 U.S.C. § 1295. The Federal Circuit’s unique appellate docket is “all administrative law, all the time.” Bill Burgess, *Federal Circuit Review—Reviewed (At Sporadic Intervals): Second Edition*, Yale J. on Regul. (Sept. 13, 2019), <https://perma.cc/DDC7-MJZ2>. Indeed, “the Federal Circuit may have the strongest claim of any court of appeals not housed on Constitution Avenue to the attention of administrative scholars and practitioners.” *Id.* It is no surprise, then, that many of this Court’s landmark administrative law cases originated at the Federal Circuit.¹²

3. Finally, this Court should grant certiorari to ensure uniformity in the circuits’ approach to general rulemaking provisions. In general, the United States has not invoked general rulemaking provisions to argue for agency interpretations of statutes, perhaps recognizing the precarity of that position. However, in at least one case where the Government has invoked a general rulemaking provision, a court of appeals has not hesitated to reject that argument. And although this Court does not look for a traditional circuit split before granting certiorari in a case from the Federal Circuit’s exclusive jurisdiction, the fact that the

¹² See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Kisor v. Wilkie*, 588 U.S. 558 (2019); *United States v. Arthrex, Inc.*, 594 U.S. 1 (2021).

Federal Circuit has broken ranks with another court provides yet another reason for certiorari.

In *Rangel-Fuentes v. Bondi*, 155 F.4th 1138 (10th Cir. 2025), the Government asked the court to defer to the agency’s interpretation of a statutory term, invoking a provision similar to the one at issue in this case: “The Attorney General shall establish such regulations . . . as the Attorney General determines to be necessary for carrying out this section.” *Id.* at 1143 (quoting 8 U.S.C. § 1103(g)(2)).¹³ The Tenth Circuit squarely rejected that argument, finding “no basis” for treating that general rulemaking provision as a delegation authorizing the Department of Justice to authoritatively construe statutes. *Id.*

Other jurists around the country have also rejected the Federal Circuit’s approach. One Fifth Circuit case, for instance, entirely ignored the Government’s invocation of a general rulemaking provision, declining to give any weight to an agency’s definition of a statutory term. *See Rest. L. Ctr. v. U.S. Dep’t of Lab.*, 120 F.4th 163, 171 (5th Cir. 2024); Br. for Appellees at 5, *id.* (No. 23-50562). And as explained *supra* at 23-24, individual judges have also decried the approach the Federal Circuit adopted, concerned about the possibility of general rulemaking provisions being used to entirely undermine *Loper Bright*.

¹³ If anything, the provision at issue in *Rangel-Fuentes* was a stronger form of delegation, as it gave the Attorney General authority to “determine[]” what regulations were necessary. *See supra* at 19.

III. This case is an ideal vehicle for addressing the question presented.

1. The question presented has been fully aired out. Briefing and decisions below thoroughly developed the legal arguments on both sides of the question. Indeed, the Federal Circuit’s *sua sponte* en banc order specifically asked the parties to address whether Section 5548(a) was a delegation to OPM under *Loper Bright*. Pet. App. 8a. Because this case arose at the motion to dismiss stage, no factual issues will complicate this Court’s review. *Id.* 7a-8a. And no further percolation is possible, because the Federal Circuit has exclusive jurisdiction over FEPA. *Supra* at 24-25.

2. The question presented is outcome-determinative. The only reason Ms. Lesko’s claim failed was because she did not allege that her overtime hours were ordered or approved in writing. Pet. App. 8a. The only reason the Federal Circuit concluded those orders or approvals needed to be in writing was because it believed Section 5548(a) bound the court to OPM’s reading of the overtime statute. *Id.* 12a-18a. The delegation question was thus dispositive below.

And there’s every reason to believe that, were this Court to hold that deference to OPM’s definition is not warranted, the Federal Circuit would side with Ms. Lesko on remand. After all, decades prior to this case, binding precedent from the Federal Circuit’s predecessor interpreted “officially ordered or approved” to include unwritten orders and approvals. *See Anderson v. United States*, 136 Ct. Cl. 365 (1956). And just over a decade ago, the Federal Circuit confirmed that the best reading of “officially ordered

or approved” includes orders and approvals that are not in writing. *See Mercier v. United States*, 786 F.3d 971 (Fed. Cir. 2015).

This case thus epitomizes an even “worse” abdication of a court’s duty, because it allows an agency construction to govern “even when a pre-existing judicial precedent holds that the statute means something else.” *Loper Bright*, 144 S. Ct. at 2265. And it offers an unusually vivid opportunity to weigh in on the general rulemaking question that the Federal Circuit’s FEPA holding implicates: It’s unlikely that another case will feature such a clear, pre-*Chevron* judicial interpretation of the precise statutory provision at issue.

* * *

In *Loper Bright*, this Court squarely held that even where “a statute is silent or ambiguous with respect to the specific issue at hand,” courts cannot simply defer to an agency’s interpretation of the statute. 144 S. Ct. at 2254 (internal quotation marks omitted). Instead, a court must use the tools of statutory construction to resolve the silence or ambiguity. *Id.*

The Federal Circuit failed to heed that direction. And because of the Federal Circuit’s all-administrative law, all-the-time docket, this decision will reinstate the *Chevron* regime not just for FEPA but for many other statutes, as well. Indeed, the approach the Federal Circuit adopted here would license a court to defer to an agency’s construction of a statute in virtually *every* case, functionally reinstating *Chevron* deference.

This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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